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The "north passage" represents the true Portland Channel as agreed to between the British Commissioners.

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NO. 1.

Had we any desire to exhibit any editorial vainglory, we might publish some of the many complimentary things that have been told us from time to time as to the excellence and helpfulness of the *Canada Law Journal*, both as to matter and to method. Rather, however, would we thank the many friends who have, by their contributions and their suggestions, helped us to make the journal what it is. They have, perhaps unconsciously, put into practice the thought of Lord Bacon thus expressed long years ago :—

“ I hold every man a debtor to his profession, from the which as men do of course seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and an ornament thereunto.”

Might we venture to lay upon some others of our readers the burden of his injunction. There are many among them capable of being “ a help and an ornament ” in the premises ; and so let them make “ amends ” and cease to be “ debtors ” to the high and honorable profession to which they belong. We thank them in advance for this “ countenance ” to ourselves and “ profit ” to their brethren.

It was said a great many years ago by a philosopher that the true lover of his country would always find more pleasure in praising than censuring its public institutions, although he was prepared to believe in the abstract that man is instinctively prone to cavil and must be morally educated in order to commend freely. However this may be, we are free to say that while we have felt it our duty to speak plainly about the shortcomings of the Supreme Court of Canada when we deemed occasion demanded it in the past, we did so with regret ; and now that opportunity presents itself to speak to the credit of that tribunal, we are prompt to record our pleasure in the matter. It is the court's expedition in disposing of business last term upon which we desire to briefly comment at this juncture. The court opened its docket of appeals on October 6th last, when a total of 56 appeals stood for hearing. Of these appeals ten were from Ontario, thirteen from Quebec, eighteen from the

Maritime Provinces, five from Manitoba, eight from British Columbia and two from the far Yukon District. When the court adjourned on the 12th December arguments had been heard and judgment given in all but eleven of the inscribed appeals, and three of these had gone over to the February term. Only the remaining eight cases stood for judgment on the 12th December. This is a thoroughly satisfactory state of affairs both for the court and its suitors, and we extend our hearty congratulations.

As we have been speaking generally in laude judicii, it may not be amiss to quote here the pleasant words concerning one of its members dropped by Lord Macnaghten in delivering the judgment of the Judicial Committee of the Privy Council in *Chapelle v. The King* on 2nd December last: "The judgment of Davies, J., appears to their lordships to deal with the subject in a manner which leaves nothing to be desired. It is concise, clear and convincing. Their lordships are unable to add anything to it in the way of argument. They will therefore content themselves with adopting it without qualification." In the case referred to, which involved among other things, the validity of the royalty of 10% imposed on the output of placer mining claims along the Yukon River by order-in-council of 29th July, 1897, the judgment of the Exchequer Court was in part reversed by the Supreme Court, and an appeal therefrom, taken by the miners to the Judicial Committee, was dismissed without costs.

We may not wonder perhaps that the general public know but little about the Alaska Boundary question, but it startles one to see such ignorance as is displayed by the *American Law Review*, an excellent and generally well informed journal. If the writer, who there undertakes to enlighten his countrymen on the subject, had taken the trouble to inform himself on the subject, or had even looked at the maps which are published on the opposite page of the article referred to, he would not have fallen into several ludicrous errors; nor would he, founding his remarks on mistakes of fact, berate poor Canada in the way he does. We need scarcely inform our readers that Prince of Wales Island is almost the largest island on the Pacific coast, apparently about 100 miles long, and away

out in the ocean, whilst Wales Island, which he calls Prince of Wales Island, is an insignificant island some way in from the mouth of the Portland Channel. We copy the following :

"A glance at the map will shew that the boundary, as made by the Commission, does not leave the southernmost point of Prince of Wales Island and proceed towards the north by the Portland Channel, but that if it had done so it would have given Prince of Wales Island and Pearse Island to the United States. Instead of starting at the *southernmost* point of the Prince of Wales Island and proceeding to the north along the pass called Portland Channel, it is made by this decision to start at the *northern* point of Prince of Wales Island and to proceed towards the north along Pearse Channel. A more obvious mal-interpretation and perversion of the language of a treaty could not be imagined."

Comment is surely unnecessary. Moreover, if the writer had correctly understood the situation he probably would not have penned such a sentence as this : "The shrill shrieking of the Canadians over this decision assaults our ears with loudest vehemence." Nor possibly would he have expressed the disgust of certain Americans at their territory being given away, as the writer in view of his comical mistake assumes it was, by saying that, "some of them would have exercised their prerogative of going down to the tavern and cussing the judges." We do not reproduce these sentences as models of legal journalism but as apparently indicating the spirit which would have actuated our neighbours had the award been against them.

THE ALASKA BOUNDARY.

It was not well that a matter so important to this Dominion, and incidentally to the British Empire, as the award of the Commission which was appointed to adjudicate in reference to the Alaska Boundary should be discussed until all the facts and circumstances should, as far as possible, be known, and any necessary explanations given. In this view we withheld comment until such time should arrive.

That which was looked for with special interest was Lord Alverstone's explanation of his action in reference to his alleged change of opinion as to the location of the Portland Channel. He now states that he declines to justify or explain his conduct

because such a course would be "a death blow to the confidence reposed in the British Bench." As to this we regret that a careful review of the circumstances attending that part of the case compels us, with great reluctance, to come to the conclusion that no satisfactory explanation is possible, and, further, that the course he thought proper to take, doubtless with all honesty of purpose, is one that will prove not only injurious to the Empire at large, but one which has, to some extent at least, impaired the confidence which this Dominion has hitherto reposed in the British Bench.

We venture to think that if, instead of a treaty between nations, this had been an agreement between individuals, brought before a court for judicial interpretation, it would not have taken long to arrive at a conclusion, and a conclusion which would have been favourable in the main to the Canadian contention. Unfortunately, considerations, other than the interpretation of the treaty, have surrounded the question and complicated its settlement.

The first article of the treaty of 1903 gives the following directions to the members of the Commission :

"The Tribunal shall consist of six impartial jurists of repute who shall consider judicially the questions submitted to them ; each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the Tribunal, and will decide thereupon according to his true judgment."

The oath taken by the Commissioners was in the following form : " I , appointed a member on behalf of the Tribunal for the decision of certain questions relating to the adjustment of the boundary between the Dominion of Canada and the Territory of Alaska under the Convention concluded at Washington between the United Kingdom and the United States of America on the 24th day of January, 1903, do solemnly swear that I will impartially consider the arguments and evidence presented to the Tribunal, and will decide thereupon according to my true judgment."

It is well known that the United States at first absolutely refused to leave the matter to the decision of any tribunal. Consent was, however, eventually given, but on the conditions that the interpretation of the treaty should be in the light of the subsequent acts of the parties, and that Messrs. Root, Lodge and Turner should be their three Commissioners ; the first being Secretary of War and the two latter Senators. Mr. Root, a gentleman of high

personal character, occupies a position which, in the opinion of many, should have debarred him from sitting on such a tribunal, and the two Senators accepted the position pledged to support the United States' contention.* It will be seen, in view of the facts above stated, that a solemn farce was enacted in agreeing to leave the matter to the adjudication of six "impartial jurists of repute." As to the good taste or otherwise of these three American Commissioners accepting the position is a matter purely for their own consideration. If they could have been said to be impartial, they would not have been chosen.

The Canadian Government appointed as its two representatives Sir Louis Jetté, Lieutenant-Governor of Quebec, and Mr. Justice Armour, of the Supreme Court of Canada, formerly Chief Justice of Ontario. The lamented death of the latter left a vacancy which was filled by the appointment of Mr. A. B. Aylesworth, K.C. The Lord Chief Justice of England was the third of the British Commissioners.

It is quite evident from what has been said, that the United States so arranged the constitution of the tribunal that they could lose nothing. This was so plain to us in Canada that our Government protested against the partisan jurists appointed by the United States Senate. The British Government, however, without regard to this protest, agreed to the terms proposed by the United States Government.

It may have been quixotic, perhaps, for the Canadian Government under such circumstances to have acted up to the letter and spirit of the treaty of 1903 by nominating representatives who were in every way "impartial jurists of repute"; but the course they took will stand to their credit in international annals. It might have been well perhaps if they had, under the circumstances, refused to send any Commissioners. But, be this as it may, these six took upon themselves the burden of the enquiry. Theoretically, they composed a court of six judges, each member of equal authority with the others. As a matter of convenience, and out of courtesy to his position, the Lord Chief Justice of England was appointed Chairman.

The functions of the Court so formed are clearly and accurately set out in the dissenting judgment of Sir Louis Jetté: "The character of the functions which have been confided to us is clearly

* As to this see 39 C.L.J., p. 171.

defined. We have not been entrusted with the power of making a new treaty, and it was not in our province to make concessions for the sake of an agreement; we had simply to give a judicial interpretation of the articles of that treaty which were submitted to us, And this position, as I take it, was rendered still more clear by the fact that, if a majority could not be found to agree, no harm was done, the way being then still left open for the governments of both countries to do what would unquestionably be in their power, that is, to settle the difficulty by mutual concessions if they found it advantageous to each other. Finding, thus, that the line of demarcation between our duties and our powers had been very clearly defined, I took it to be my first duty, in passing on the different questions submitted to us, not to assume any more power than had been given to me by this first article of the Convention of 1903."

The case was fully presented to this court, all the evidence obtainable was adduced, and the arguments on either side were lucid and exhaustive. The result is known to our readers as being, except in some unimportant matters, favourable to the United States. But it is noteworthy in view of what hereafter appears that the main findings are manifestly not framed from the evidence advanced on either side, and do not follow the contention of either party.

As to the merits of the case, those who have the time can now easily satisfy themselves as to whether or not justice was done in the premises; whilst others who may not have this opportunity will very likely be inclined to accept as conclusive, in favour of Canada, the judgments of our two Commissioners, who entered upon an entirely unknown field of enquiry, and we may well believe from the character of the two men, with an honest intention to do justice in the premises. It was never questioned but that the Lord Chief Justice of England, who was appointed by reason of his holding that high position, would give his decision according to the evidence. On the other hand, it was naturally expected, from what has already been said, that the three American Commissioners would stand together in favour of the United States, no matter what the evidence might be, or what arguments might be advanced.

It was felt, therefore, that the best we could hope for, in view of the constitution of the tribunal, was a disagreement as to the main points at issue.

Much has been said in the public press, both of England and the United States, as to the feeling evoked in Canada by the result of the Commission—some pleasantries on the part of our friends to the south of us, and some patronizing condolences from the motherland. Most of these writers, however, entirely misconceive the point which has evoked criticism in Canada.

What then was the cause of complaint so far as Canada was concerned? To understand this it is necessary to see how the matter stood as between the British Commissioners, from Canada, and their colleague, Lord Alverstone; and to arrive at this we must refer to the questions submitted for adjudication by the Commissioners.*

The first was as to the point of commencement. As to this there was no difference of opinion, it being agreed by all to be Cape Muzon, on a small island at the south-westerly end of Prince of Wales Island.

The second question was "What channel is the Portland Channel?"

To understand the dissenting judgments, hereafter referred to, it must now be stated that when the vote was taken on the above subject this second question was divided into two parts:—

1. "Does Portland Channel run to the north of Wales and Pearse Islands?"
2. "Does Portland Channel run to the north of Sitklan and Kannaghunut Islands?"

The vote was accordingly taken seriatim on these two questions. Why the question was thus divided, and why it was not put in its simpler form, and in the form required by the treaty, we have no information; but light is thrown upon this division by subsequent events. The framing of these questions seems to have led up conveniently to the sudden change hereafter referred to by the four signing Commissioners.

The answer to the first question was in the affirmative by all the commissioners. The answer to the second was "No" by the three United States and Lord Alverstone, and "Yes" by Sir Louis Jetté and Mr. Aylesworth.

Just here two remarkable facts assert themselves, and demand investigation and explanation.

*These are given in full in 39 C.L.J., p. 181.

Up to the time when the Commissioners were called together to have their votes formally recorded, the three United States Commissioners had persistently held that Portland Channel ran to the *south* of all four islands and therefore *south* of Wales and Pearse Islands ; and, up to that moment there had never been any variation from the opinion expressed in the original memorandum prepared by the three British Commissioners, (and read as embodying their views, to the whole Board, as stated in the protest of Jetté and Aylesworth) nor from Lord Alverstone's formal written reasons for his judgment, as subsequently made public, to the effect that Portland Channel ran to the *north* of all four islands and therefore *north* of Sitklan and Kannaghunut. In these documents it is also found, as a matter of fact, that the channel running north of the four islands issues into the Pacific at 54 d. 45 m which is the *exact point* at which the *true* Portland Channel commences as claimed by the British case. In the face of all this however, in the reasons of his judgment, published *after* the making of the award, Lord Alverstone says that the Tongas passage between Wales and Sitklan is Portland Channel (see 39 C.L.J. 690).

Of course, it was quite competent for these four judges to change their findings at the last moment ; but the coincidence of their doing so at the same time, and without any suggestion to the other two judges they having all sat together when discussing the case, and giving a judgment, apparently made to fit in with an award, which, but for these changes, probably never would have been made—is so remarkable as to rivet attention.

This singular double somersault could scarcely have occurred as it did without there having been some such compromise as has been alleged, and it gives colour to the charge that the award was not a judicial finding and did not give the "true judgment" of either Lord Alverstone or of the United States Commissioners.

That part of the dissenting judgment of Mr. Aylesworth with which we are now concerned is as follows :—

"Upon the second question I quote the words of the President of this Tribunal. Among the facts relating to Portland Channel he finds:—'The latitude of the mouth or entrance to the channel called Portland Channel, as described in the treaty and understood by the negotiators, was 54 degrees 45 minutes. . . . Among the general considerations which support his conclusion he states that 'Russia and Great Britain were negotiating as to the point on the coast to which Russian dominion should be conceded. It is unnecessary to refer to all the earlier negotiations, but

it is distinctly established that Russia urged that her dominion should extend to 55 degrees of latitude, and it was in furtherance of this object that Portland Channel, which issues into the sea at 54 degrees 45 minutes was conceded and ultimately agreed to by Great Britain. No claim was ever made by Russia to any of the islands south of 54 degrees 45 minutes except Prince of Wales Island, and this is the more marked because she did not claim the whole of Prince of Wales Island, a part of which extended to about 54 degrees 40 minutes. The islands between Observatory Inlet and the channel to which I have referred above as the Portland Channel are never mentioned in the whole course of the negotiations.'

These extracts are from Lord Alverstone's memorandum expressing his considered judgment on this branch of the case. These conclusions have been arrived at after full discussion among ourselves of the answer which, upon the evidence, should be given to the second question—in which discussion each member of the Tribunal has stated at length his individual views. Concurring, as I do, in the findings of fact stated in this memorandum, I should have contented myself with differing from the conclusion reached but for the course our proceedings have taken.

Consideration of the second question has been to-day resumed, and by unanimous vote of the Tribunal it has been affirmed that each member, 'according to his true judgment,' believes the Portland Channel mentioned in the treaty to be the channel extending towards the sea from latitude 55 degrees 56 minutes, and lying to the north of Pearse and Wales Islands. But, notwithstanding the unanimous finding of fact, it has been, by the majority of the Tribunal, decided that the boundary line starting from Cape Muzon shall run to the south instead of to the north of Kannaghunut and Sitklan Islands, and so shall enter Portland Channel between Sitklan and Wales Islands. This course for the boundary is directly opposed to the distinct findings made and the whole line of reasoning adopted by the President in his memorandum of reasons for the decision. It is a line of boundary which was never so much as suggested in the written case of the United States or by counsel during the oral argument before us. No intelligible reason for selecting it has been given in my hearing, no memorandum in support of it has been presented by any member of the Tribunal, and I can therefore only conjecture the motives which have led to its acceptance.

It is admitted by everybody as absolutely clear and indisputable that, on the occasion of his naming Portland Canal, Vancouver, in his exploration of that channel, traversed it from its head inland to its entrance into the ocean in latitude 54 degrees 45 minutes—that in so doing he sailed down Portland Channel along the passage north of Pearse and Wales Islands and straight onward to the sea through the passage north of Sitklan and Kannaghunut Islands. Everyone knows and admits that Vancouver never traversed the passage between Sitklan Island and Wales Island through which the boundary line is now made to run. No more can it

be pretended that this passage (which is now called Tongas Passage) was ever named by Vancouver—was ever treated by him, or by any map-maker at any time, as in any way belonging to Portland Canal or was ever thought of by those who negotiated the treaty of 1825 as being any part of that channel. The Lord Chief Justice finds, as a fact which the maps and documents establish, that one entrance of Portland Channel was between the islands now known as Kannaghunut and Tongas. I concur entirely in this finding, but must add that this entrance to the channel is the only entrance to it ever known or in any way treated as part of the channel.

There is simply not the slightest evidence anywhere that I am able to find that either Vancouver or any subsequent explorer or map-maker ever considered or so much as spoke of Portland Channel as having two entrances to the ocean or as including the passage through which this boundary line is now made to run. But even if there were two or more such entrances Vancouver's narrative and maps absolutely fix the one he explored and named by giving its exact latitude to the minute, 54 degrees 45 minutes. And the President finds as a fact that this mouth or entrance is the one 'described in the treaty and understood by the negotiators.' By what right, then, can this Tribunal, sitting judicially, and sworn to so determine and answer the questions submitted, reject the channel so 'described in the treaty and understood by the negotiators' and seek for a totally different channel which, until now, no one ever thought of as any part of the Portland Channel mentioned in the treaty? 'I point to the additional circumstances so forcibly stated by my Lord. The whole negotiations were as to the 'point on the coast,' to which Russia's southern boundary should be carried. The treaty fixes as that point the promontory of the mainland immediately to the north of Kannaghunut and Sitklan Islands, the latitude of which is 54 degrees 45 minutes. The next point of mainland coast to the southward is Point Maskelyne, and it, of course, is undisputable British territory. The islands which lie between were never asked for by Russia. As the President's memorandum says, they were never so much as mentioned in the whole course of the negotiations; they lie wholly to the southward of 54 degrees 45 minutes, wholly to the southward of that entrance to Portland Channel which alone is 'described in the treaty,' or was "understood by the negotiators," that is to say, wholly to the southward of the true boundary, and yet the majority of this Tribunal is prepared to take two of those islands from Canada and transfer them to the United States.

How can such a determination be reconciled with our duty to decide judicially upon the question submitted to us?

It is no decision upon judicial principles, it is a mere compromise dividing the field between the two contestants.

The formal answer which the President's memorandum makes to the question submitted is alone sufficient to condemn the boundary the Tribunal is making. Question.—What channel is the Portland Channel?

Answer.—‘The channel which runs to the north of Pearse and Wales Islands, the Islands of Sitklan Kannaghunut and issues into the Pacific between Wales Island and Sitklan Island.’*

This language simply disregards entirely the relative position of the islands in question. Wales Island lies due east of Sitklan. But the channel which runs to the north of Sitklan and Kannaghunut joins the ocean there, and therefore of necessity issues into the Pacific at that place, and it is the undoubted mouth of Portland Channel. The treaty makes Portland Channel the boundary, and if, as this answer formally states, Portland Channel is that channel which runs to the north of these two islands, such two islands are necessarily British soil.

The whole truth of the matter is simply this—that, as to Portland Channel, the case of Great Britain before us has been demonstrated to be unanswerable. By unanimous vote of this Tribunal it has been so declared. It was therefore impossible to avoid awarding to Great Britain the islands called Pearse and Wales. It is equally impossible upon any intelligible principle for a tribunal acting judicially to hold that Portland Channel immediately on passing Wales Island, makes a turn at right angles to itself and runs between the islands of Wales and Sitklan. The sole question presented to us for decision on this branch of the case was whether the Portland Channel of the treaty lay north of the four islands or south of the four, and until to-day it has been uniformly admitted by everybody that all four of these islands belonged, all together, either to Great Britain or to the United States. Instead of so finding, the majority of the Tribunal have chosen a compromise with the plain facts of the case, and, while awarding Pearse and Wales Islands to Great Britain, have determined to make those islands valueless to Great Britain or to Canada by giving to the United States the islands called Sitklan and Kannaghunut.”

The appropriate part of the dissenting judgment of Sir Louis Jetté is also quoted as follows :—

“The contention of Great Britain is, to my mind, clearly supported by Vancouver’s narrative of his voyage of 1794, when, after relating his movements in these waters, day by day, and specially from the 27th July to the 2nd August, he says : ‘On the morning of the 2nd (August) we set out early, and passed through a labyrinth of small islets and rocks, along the continental shore; this, taking now a winding course to the south-west and west, showed the south-eastern side of the canal to be much broken, through which was a passage leading S.S.E. towards the ocean. We passed this in the hope of finding a more northern and westerly communication, in which we were not disappointed, as the channel we were then pursuing was soon found to communicate also with the sea, making the land to the south of us one or more islands. From the north-west point

* This language was, after signing of the award, changed by omitting the words “the Islands of Sitklan and Kannaghunut ” See 39 C.L.J. 181.”

of this land, situated in latitude 54 degrees 45½ min., longitude 229 degrees, 28 min., the Pacific was evidently seen between N. 88 W. and S. 81 W.' Adding finally (under date 15th August): 'In the forenoon we reached that arm of the sea whose examination had occupied our time from the 27th of the preceding to the 2nd of this month. The distance from its entrance to its source is about seventy miles, which, in honor of the noble family of Bentinck, I named Portland Canal.'

When this second question was put to the Commissioners, at the time of rendering the award, every one of them, as will appear by the official report, answered that Portland Channel was the channel that passed—contrary to the American contention—to the north of Pearse and Wales Islands. But on a sub-question being put, the majority of the Commission decided that after passing north of Pearse and Wales Islands, it should pass south of Sitklan and Kannaghunut Islands, which lie directly to the westward of Pearse and Wales Islands; should make a curve there, and, abandoning its northern course, should reach the sea through Tongas Passage instead of following the continuous straight line which, a moment before, had been found to be the proper one. I voted against this sub-proposition, because I found that it was totally unsupported either by argument or authority, and was, moreover, illogical. The Commission had, just a moment before, decided—and very properly, I believe—that Portland Channel, as described by Vancouver, was that channel indicated on all the maps as running straight to the sea; it had refused to accept the contention of the United States to have it leave its northern course, and, making a curve at Pearse Island, to run through Observatory Inlet, and all at once it is decided that this very channel shall make a curve lower down, that it will now leave its straight northern course and run into the sea through Tongas Passage. I can only say that if this decision is a correct and just one, I am very much afraid that the majority of the Commission has committed an injustice towards the United States in refusing to admit its contention that the channel ought to make that curve a little higher up, at the head of Pearse Island, which solution would appear to any one having studied the map, a much more sensible and reasonable one than that which has been adopted."

The Chief Justice, therefore, found, as a matter of fact, that, in his "true judgment," Portland Channel was to the *north* of the four islands; whilst the three American jurists had previously held that it was to the *south* of them; but these four join in a finding which, in defiance of the respective opinions, states that the Channel goes *north* of Wales and Pearse Islands, and *south* of Kannaghunut and Sitklan.

So much as to the Portland Channel. What about the mountain range?

Without going into this at length it may be shortly stated that

the line, as found by the award, was not the line contended for by either party. The contention on one side was that mountain peaks near the sea governed, and that they furnished a chain of summits within the treaty. On the other side, it was stoutly urged that there was no mountain range that could be found on the ground to answer the requirement, but that the line must be defined by the other alternative, the ten league limit from the coast. But by the award the majority selected peaks of isolated mountains, which had not been contended for by either party, and for the selection of which there was not a tittle of evidence and which mountains were, of course, unknown to the makers of the treaty of 1825.

We leave it to the intelligence of our readers to form their own opinion as to whether there was or was not a compromise as to this question, as well as to the one as to Portland Channel.

Is it possible to believe in view of these admitted facts that there was a "judicial finding" and a "true judgment" given according to "arguments and evidence presented to the tribunal."

If these two questions were settled by arrangement, why not a third. Are we sure that, even as to Lynn Canal, we have in the award the "true judgment" of the Chief Justice?

If it was a compromise award we may ask his Lordship what right he had to settle a boundary for Canada. That was no part of his duty. He was simply one of six judges. We cannot suppose he acted under instructions from the British Government. He would indignantly have resented any approach of that kind. But; if any arrangement was come to with the American Commissioners, and if it was proper so to deal with the subject, why were not the Canadian Commissioners consulted. They were much more interested in the matter than he was, and much more competent in every way to deal with the question. Possibly he had seen that his co-judges from Canada recognized (as expressed by Sir Louis Jetté) that they were all *judges*, and not diplomatic agents appointed to make a boundary.

Small wonder that when the successful Commissioners reported the result to their President he remarked "This award is the greatest diplomatic victory of our time?" Note well that he called it a *diplomatic victory*. Then, after all, it was *diplomacy* that won the victory; and the award was not a "*true judgment on the arguments and evidence*." The President unwittingly let the cat out of

the bag, and so, from the other side also, comes evidence of an award by arrangement.

If the document, signed by the four Commissioners, was not a judicial finding within the terms of the treaty, neither was it a valid award by reason of want of finality, inasmuch as it left undetermined 120 miles of boundary. This is no mere legal quibble, but may be a very serious matter in the future, for it leaves the door open for further disputes. The object of the Treaty has not been arrived at. Lord Alverstone should, as Chairman, have refused to close the Commission until all its work had been done.

To prevent misunderstanding of this subject it may here be stated what must be perfectly evident to any unprejudiced person that neither the width or navigability of the channel north of the four islands, nor the distance of Sitklan and Kanaghunut from Port Simpson, nor whether they or Wales Island are of any strategic value, can have the slightest bearing upon the question as to "what channel is Portland Channel," or whether Lord Alverstone was justified in his action. Even he does not claim anything of the kind.

Statements such as the above have since been made, and it is also said that subsequent enquiry shows that the two westerly islands are comparatively insignificant. It is therefore suggested that possibly Lord Alverstone (being in some way aware of all this) thought the possession of them immaterial. But can this suggestion be said to fit in with the other circumstances connected with the finding, and if so why was not this phase of it discussed before the formal taking of the vote. We gladly give the Chief Justice the benefit of the suggestion, simply remarking however that it does not relieve him of the charge of extreme discourtesy, to say the least of it, towards his colleagues from Canada who had reposed entire confidence in his dealing with this branch of the case in the way that it had been settled between them.

To return for a moment to Canada's cause of complaint. It is, of course, felt that the award is not in accordance with the evidence, but, apart from that, the feeling of irritation did not arise because we lost Lynn Inlet; nor because we have been deprived of all harbours on the coast, and are shut out from access to our territory by water communication; nor because territory which we believed, and still believe, properly belongs to Canada has been taken from us. In short, there would have been no protest made

if there had been a "judicial" finding, according to the terms of the treaty, on all the questions submitted, even though in favour of our opponents. But what we do complain of is that we have been deprived of our territory *without* any judicial finding to that effect, and that a compromise has been made sacrificing our interests by one who had no authority in that regard; by one who was only a judge—not an umpire—not an agent of the British Government or clothed with any authority to do what he did; and who, moreover, to our detriment, made an arrangement without consulting the representatives of this Dominion, and behind their backs.

If the matter had been between ordinary litigants, an award begotten in such a manner would be subject to be set aside by the courts. Even here it would have been competent, though possibly not politic, for the British Government to repudiate it as a miscarriage of justice. And so the award stands because there can be no appeal.

The English *Law Times* expresses the opinion that "the action of the two Canadian Statesmen," (why call them "statesmen"; they were not so in this connection, and Mr. Aylesworth has never been in public life; but there seems to be a desire in England to give this Commission a diplomatic rather than its true judicial aspect) "in refusing to sign the award of the majority of the members of the Commission on the ground that the finding of the Tribunal is not, in their opinion, judicial, must be regarded as one of the most painful incidents in the history of international arbitration. It has even been suggested that the award has not been given on the merits of the case judicially considered, but on the merits of the relations between Great Britain and the United States in their diplomatic aspects. Lord Alverstone, who may be regarded as the non-political head of the English Judiciary, cannot be injured by an imputation of this character, which is calculated to reflect discredit on its authors."

The above was written early in the day, and not in the light that we now have. As it stands, it simply means that the Chief Justice of England can do no wrong, and therefore, Lord Alverstone, who happens to occupy that position, is above criticism: which is absurd. There is no desire on the part of any one in this country to injure the character of Lord Alverstone, and we are most heartily sorry that we are compelled in justice to the people of this Dominion and to their representatives on the Commission

to set the facts before our readers. If these facts, and the conclusions which apparently must be drawn therefrom, are not to the credit of Lord Alverstone, it is not our fault. His being the "non-political head of the English Judiciary" gives him no immunity from fair and temperate criticism. Beyond that we are incapable of going.

Sir Louis Jetté and Mr. Aylesworth joined in a protest against the award and gave dissenting judgments. This has given occasion to some adverse criticism. If their language was strong, or even possibly too strong, it was not without excuse, and certainly the course they took was not without ample precedent. Quoting again from the *Law Times* we read that Sir Alexander Cockburn, one of the greatest of England's Chief Justices, who "represented Great Britain under the Treaty of Washington at the Alabama Arbitration held in Geneva in 1872, dissented from the award and explained his reasons in an elaborate report. His language on that occasion was plain and pointed; he did not mince matters, and time proved that he was right. We venture to think that will be the case here.

The position of the British Commissioners from Canada was a most trying and difficult one, owing to the unexpected and extraordinary attitude taken by the British Commissioner from England. The latter appeared to forget that he was simply one of a Board of Judges and assumed the position of an umpire whose duty it was to decide between the representatives of Canada on one side and the United States on the other. This at least is the only solution of his action that occurs to us, and on this supposition we can well believe he acted with entire honesty of purpose. He seems to have been impressed with an incorrect idea that it would be an international calamity if there should not be an award of some sort, and that his mission was in that way to keep up cordial relations between England and the United States. So filled was he with this thought, that, imagining he was the best person to deal with the situation and knew much better than Canada's chosen representatives did, as to what was most in her interest, he ignored them completely, and took what we in this country (and we are best able to judge) believe to have been an entirely false position; and meeting men more competent to deal with matters of that kind than himself made what we regard

as a disastrous and irredeemable blunder. This, however, we gladly charge to his head rather than to his heart.

The best that Canada could have hoped for was a disagreement, but the advantage would have been that all the evidence and arguments would have become public property. Literature would have been collected and provided from which it would have been possible to have arrived hereafter at a fair compromise by diplomatic negotiations by men competent to deal with the question in that aspect. This advantage, however, has been lost by Lord Alverstone's conduct—most mistaken in conception and most unfortunate in results.

As to the representatives of the United States on this Commission, we have no quarrel with them as to the award. As sharp business men they are entitled to the credit of their clever handling of the matter, and have received, properly enough, the congratulations of the President and their people. But never again will there be a commission constituted as was the Alaska Boundary Commission for the settlement of any question affecting the territorial rights of the Dominion of Canada.

We recognize, of course, that the parties to the treaty are Great Britain and the United States, although it is Canada that is directly interested in the dispute. We also recognize that the general interests of the Empire, of which we form an integral part, are not to be ignored, either on moral grounds or grounds of expediency. And it may be claimed that for some reason which has not been made public it was necessary to submit to the demand of the United States for territory on the Alaskan border which, we say, belongs to us. But if this was the mind of the British Government, we have three things to say:—(1) Giving in to the demands of the United States, from time to time, and ignoring some very questionable diplomatic proceedings relating thereto*, is not the way to secure their respect and co-operation. They have naturally come to the conclusion that a very mild threat is all that is necessary to bring England to their terms; and the feeling among their politicians may be expressed in a remark which has

* In this connection reference might be made to a collection of historical facts in British and American diplomacy affecting Canada, 1782-1899, by Mr. Thomas Hodgins, K.C., Toronto, 1900, and to an unsavoury episode at the time of the Behring Sea arbitration, when there was produced as evidence, from the archives at Washington, a document which turned out to contain interpolated forgeries. It was, of course, subsequently withdrawn.

actually been made—"England is playing our game for us with Canada." (2) If it be necessary to secure their good-will, by giving up portions of our territory, it is not consistent with the dignity of British Statesmen to be parties in the solemn farce of joining in the formation of a Board of judges to adjudicate upon one of these territorial claims, under the conditions and circumstances, hereinbefore referred to. (3) If so necessary, as aforesaid, Canada can well say that she has the right to be consulted, and to be a party to the deed of gift. Her patriotism and loyalty to the Empire (proved on many occasions and sealed by the blood of her sons) will be equal to the strain.

In conclusion, let it be understood, once and for all, that Canada is an integral part of the British Empire. Let it be also understood that neither the permitted aggressiveness of any other nation, nor the apathy, indifference or desertion of those who for the time being control the policy of our Empire, or of those appointed by them, or of any one who improperly takes upon himself any authority in that behalf, can change our attitude to the motherland. All those things have happened to us in the past ; but we recognize that our countrymen in the old land, though possessing the many sterling characteristics which make the Anglo-Saxon race what it is, are naturally somewhat inclined to be self-opinionated, and so, often appear indifferent to the rights of their kindred abroad. Assuming a knowledge of other people's affairs which they do not possess, they too often treat others with an assumption of superiority which is apt to be irritating and offensive. Some such characteristics as these lost to England the thirteen states of the Union.

But there is no danger of any such result so far as Canada is concerned. She is as much a part of the Empire as any portion of the British Isles. The thought of annexation with the United States is dead and buried long ago and beyond possibility of resurrection. The so-called colonies compose the larger part of the Empire and are rapidly becoming more and more important elements in its existence, and are necessary to England's future. The Duke of Wellington, a far sighted man, one said : "England can as well do without London as without Canada." This is equally true with regard to our other great possessions. There is as we say no shadow of a thought in this Dominion of any dismemberment ; but simply that, should the occasion arise, we shall insist

upon our rights so far as they are consistent with the welfare of the Empire as a whole. A homely but apt illustration might be given of sons who have grown to manhood under the fostering care of the "old folks at home;" but the time comes, as come it must, when the latter need the support and advice of the former. It is given gladly and lovingly to the utmost limit of their powers, but those who are thus coming to the front and beginning to assume the burdens must have some say in the management of the estate.

We look forward hopefully and patiently to the time when those in the old homeland will understand more of this great Dominion and its vast possibilities, and the free, brave race of men developing therein; who (we say it unboastingly) more alert and of wider vision than themselves, are seeking to work out their desired destiny with loyal devotion and adherence to the worthiest traditions of the two little islands from whence came so many of the forefathers of Canada in the days gone by.

CRIMINAL APPEALS AT COMMON LAW.

In the course of a very thoughtful article in the *New York Independent* on the policy of abolishing appeals in criminal cases as a means of checking the barbarous practice of lynching—the merits of which we shall not now discuss—Mr. Justice Brewer, of the Supreme Court of the United States, makes a statement as to a matter of juridical history which invokes our criticism as to its accuracy. He says: "I have hitherto called attention to the fact that in England . . . up to the last few years there was no right of appeal in criminal cases." In order that there may be no misunderstanding of his meaning the learned judge thus explains himself: "What is meant by the right of appeal? It is the claim that every one defeated in a trial in one court may, if he wishes, compel a review of that trial before there is a final judgment against him." He also quotes a judgment of the Supreme Court of the United States which declares that "a review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law" (153 U. S. 684, 687.) We need not concern ourselves with an explanation of what is here meant by the words "a necessary element of due process of

law." Suffice it to say that Mr. Justice Brewer treats the case as an authority for his view that neither at common law, nor under the constitution of the United States, could a convicted criminal claim the right of appeal.

Now, with deference, we shall endeavour to shew that at common law there was a right of appeal in criminal cases, limited it is true, but still a right.

The privilege of a party in any legal proceeding, who feels himself aggrieved by the decision of the court of first instance, to appeal to a higher court carries us back to the very beginning of British institutions. "I may carry my plaint to the foot of the throne," was the proud boast of the mediæval suitor.

In the time of the Anglo-Saxon kings the Witenagemot was the highest court of justice in causes civil as well as criminal. The late Professor Freeman was able to shew (*Norman Conquest*, v. pp. 386, 387), with great clearness we think, that in respect of its judicial capacity the House of Lords not only grew out of the Witenagemot but is, practically, an extension of it. The *curia regis* of the Norman kings was but a committee of the Witan, the latter having been transformed into the *magnum consilium*, which, in turn, after the admission of representatives from the counties, cities and boroughs, became known as the "Parliament." The *curia regis*, which consisted of such ecclesiastics and barons as held high office in the royal household, together with such persons as were learned in the law, called *justitiæ* or *justitiarū*, was presided over by the King himself, or, in his absence, by the chief justiciar, and was the seat of supreme judicature, both original and appellate. Later on, when the *curia regis* had transferred its original jurisdiction to the Chancery and the three common law courts, the King, to whom as fountain of justice, the subject, on the failure of the regular tribunals, had a right of appeal, retained his supreme appellate jurisdiction, and exercised it sometimes through his ordinary or standing council (the inchoate House of Lords), and sometimes through the *magnum consilium*, or Parliament (cf. *Dennison and Scotts' House of Lords Practice*, xxv). Speaking of the appellate jurisdiction of the House of Lords, Blackstone says: "The House of Peers, which is the supreme court of judicature in the kingdom, has at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law committed by the courts below. To this

authority they succeeded of course upon the dissolution of the aula [curia] regis." (Com. iii, c. 4, p. 56.)

In the earliest records of Parliament we find petitions to the King to remove causes from the ordinary common law courts into the House of Lords, but the only judicial proceeding by which matters of a criminal nature could formerly be brought there was by writ of error: Arch. Crim. Prac. 197. Proceedings in error, which ultimately became the regular medium of appeal from the inferior to the superior courts of common law, had their origin in the thirteenth century. In Bracton's "Note Book," pl. 1166, we find perhaps the earliest recorded instance of judicial proceedings in error. There we are informed that in the year 1235, at the instance of the Abbot of St. Augustine's, Bristol, a case in which, so the good abbot opined, the "Judges of the Bench" had been guilty of error, was brought "before the King" coram Rege). Thereupon, the judges having "pleaded ignorance," the judgment was set aside.

The early books shew that there was some doubt whether writs of error lay as of right, or were granted by the King ex gratia.

Lord Holt, in speaking generally of the writ, is reported to have said: "A writ of error may be against the King without petition, though anciently that was used, and was a decency; but since 1640 writs of error have been made out ex officio:" 1 Salk. 264. In *Christie v. Richardson*, 3 T.R. 78, a much later case, Lord Kenyon said: "If it were fit that parties should be restrained from bringing writs of error, the Legislature must interfere. But, by the constitution of this country, every subject has a right to have his cause reviewed by a court of error."

In 1705 the question was deliberately considered by the judges of the Queen's Bench. In 2 Salk. at p. 504 (*Reg. v. Paty*), we have the following report of the matter: "And now a new question was started and referred to the judges, whether the Queen ought to allow a writ of error in this or any other case ex debito justitiæ, or ex mera gratia? And ten of the judges were of opinion that the Queen could not deny the writ of error; but it was grantable ex debito justitiæ, except only in treason or felony." In commenting upon *Reg. v. Paty* in *R. v. Wilkes*, 4 Burr. at p. 2551, Lord Mansfield says: "This opinion in the 3rd of Queen Anne has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor if there be possible cause, it ought

not to be denied : this court would order the Attorney-General to grant his fiat. But be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive."

In chapter 30 of Book IV. of his Commentaries, Blackstone says, p. 392 : " A judgment may be reversed by writ of error, which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers. . . . These writs of error to reverse judgments in case of misdemeanors are not to be allowed of course, but on sufficient probable cause shewn by the Attorney-General, and then they are understood to be grantable of common right and ex debito justitiæ."

Under the modern English practice in criminal cases a writ of error lies to the Court of Appeal from the Crown side of the King's Bench Division of the High Court of Justice for every defect in substance appearing on the face of the record, for which an indictment might have been quashed, or which would have been fatal on demurrer or in arrest of judgment, provided such defect is not cured by verdict, and provided no question of law has been reserved for the Court of Crown Cases Reserved, under 11 and 12 Vict., c. 78. (See 35 and 36 Vict., c. 66, s. 47). It must be a defect in substance appearing on the face of the record, and not contrary to the record, for the record is an estoppel : *K. v. Carlisle*, 2 B. & Ad. 362 ; *R. v. Newton*, 24 L.J.C.P. 148 ; and it must be a final judgment. But in no case can the writ be issued until the fiat of the Attorney-General therefor has been first obtained : Short & Mellor's Crown Office Rules, p 317. The Attorney-General has discretion to withhold a fiat : *In re Piggot*, 11 Cox. 311. An appeal from the Court of Appeal to the House of Lords on a judgment upon a writ of error can now only be had upon petition : The Appellate Jurisdiction Act, 1876, sec. 11.

So it will be seen that recent legislation instead of enlarging the old "right" of appeal at common law has rather been in the contrary direction ; and that it is not in any sense correct to say "in England up to the last few years there was no right of appeal in criminal cases."

CHARLES MORSE.

FORMER STATUS, JUDICIALLY, OF CITIES.

The profession in Ontario generally may not know that, less than half a century ago, Toronto, with her sister cities, Hamilton and Kingston, fulfilled under the law, all of the requisites of what is known as "a County of a City". The Act of Upper Canada, c. 81, s. 85, prescribes, in fact, that such cities shall, "for all municipal purposes as are herein or hereby specially provided, be counties of themselves".

The infallible test by which a city will be found to answer the description of "a County of a City" is the existence of a separate Quarter or General Sessions of the Peace. This criterion was furnished, although county justices were allowed to hold their sessions within the limits of a city.

A separate Commission of the Peace issued for the city, it being expressly declared "that justices of the peace for a county in which a city lies shall have no jurisdiction over offences committed in a city, and the warrants of county justices shall be required to be endorsed before being executed in a city, in the same manner as required by law when to be executed in a separate county." Commissions of 1866, appointing justices for Toronto, contain the expression "for the County of the City of Toronto."

The case of *Reg. v. Rowe*, 14 C.P. 307, is interesting as exhibiting the strictness with which the respective authorities of justices of the peace for a county and a city were interpreted. The prisoner had given evidence upon a charge before a magistrate, alleging the commission of a felony in the County of Middlesex. When administering the oath, and taking the evidence, the justices sat in the City of London. It was objected by counsel for defendant, on his trial, that the justices had no jurisdiction or authority to administer the oath to the defendant inasmuch as they were then sitting within the City of London, where, as justices of the County of Middlesex, they had no jurisdiction. The objection, disallowed by Morrison, J. at the trial, was upheld by the Court in banc, judgment being delivered by the late Sir John B. Robinson.

The decision brings out, moreover, the difference between the old and new law in respect to the place of sitting. The law for sometime back has permitted justices of the peace for the county, directing an enquiry into an offence occurring within their juris-

diction to sit in a city within its limits. The change in the statute law in this respect formed the subject of Mr. Justice Rose's deliverance in *Reg. v. Riley*, 12 P.R. 98.

Besides the provisions to which reference has been made, a Recorder's Court was established in every city, which had, "as to crimes and offences committed in a city, and as to matters of civil concern therein, the same jurisdiction and powers as Courts of Quarter Sessions of Peace in the County." It will, therefore be observed that cities, during the greater part of the time of the union of the Provinces, were judicial entities, as, indeed, every city of importance in England is to-day.

Is not the point worthy of consideration whether, as regards the larger cities of the Province, it would not be well to return to the old state of the law?

J. B. MACKENZIE

By the amendment of the Loan Companies Act (R.S.O. c. 205) made at the last session of the Ontario Legislature it is, amongst other things, provided by a section added to the principal act, viz: 49 A., that sections 41 to 49, both inclusive, shall in the respective cases equally apply to the purchase and sale of the assets of one trust corporation to another and to the amalgamation of trust corporations, etc. Sec. 46 of the principal Act was however repealed by 63 Vict. c. 27. s. 8. which substituted other provisions therefor relating to the registration of the certificate of assent to amalgamation. It may, therefore, be a matter of moment to consider whether this latter revision comes within the new section 49A. It is possible that the Courts may be able to regard the substituted section as merely an amendment of the original s. 46. The Industrial Schools Act (R.S.O. c. 304), is also amended so that s. 16 now has two sub-sections numbered (2). See 2 Edw. VII, c. 37, s. 5.

LA BELLE DAME SANS MERCI.

(D'après Keats.)

MONTAGUE v. BENEDICT : 3 B. & C. 631.

It is a "vulgar error," traceable apparently to this case, that "jewels are not necessities"; yet the case only decides that in view of the defendant's social and financial circumstances, and his wife's fortune, the trinkets supplied to the latter by the plaintiff could not be considered part of her necessary apparel. Where a husband and wife are living together the term "necessaries" is defined by Willes, J. in *Phillipson v. Hayter* L. R. 6 C. P. 38 as articles "really necessary and suitable to the style in which the husband chooses to live, in so far as they fall fairly within the domestic department which is ordinarily confided to the management of the wife." When they are living apart, the presumption that the wife has her husband's authority to purchase "necessaries" does not always apply—but that, as Mr. Kipling says, is another story.

*O what can ail thee, Montague,
Alone and palely loitering?
The look is in thy hollow eye
Ill-hap doth bring.*

*O what can ail thee, man of pelf,
So haggard and so woe-begone?
For, certes, gold is to be had,
And patrons to be 'done'!*

*I see a paper in thy hand,
A judgment dight with stamp and seal:
It holds thee with a mystic spell,
Thy senses reel.*

*"A lady visited my shop,
A fême covert—but not my wooing—
Her eyes full bright, and purse full light,
Were my undoing."*

*"A golden dagger for her hair,
And bracelets, too, and jewelled zone,
I wrought for my fair customer—
Their price I moan."*

*"Her promises lulled me asleep,
Her lord would pay—ah, woe betide!
The siren looked as she spoke true
The while she lied".*

"Eftsoons I haled him to King's Bench,
(A fearsome thing—he practised there!)
But Benedict his wife's smooth speech
Did straight forswear".

"Ah, me! my trinkets rich and rare
He neither purchased nor had seen;
His wife must dress in modest guise,
Not like a queen".

"To give her sixty pounds a year
Was all he might (my bill was more!)
Beyond her station were these gauds—
All this he swore".

"Twas vain I urged '*implied assent*'
And all the burden that it carries;
The Court adjudged my jewels were
Not '*necessaries*.'"

"Then as they found no '*agency*'
Of wife for husband *re* my bill,
In law or fact, they handed down
A non-suit chill."

"And this the paper in my hand,
A judgment dight with stamp and seal:
It holds me with a mystic spell,
My senses reel."

CHARLES MORSE.

The Law Times, (England), in its Irish notes refers to an interesting case of a novel character. A paralyzed man desired to make his will, but was unable to speak or to move his hands. His intellect however, was clear and he had the power of opening and shutting his eyes. His solicitor ingeniously arranged that the closing of his eyes was to mean an affirmative answer to a question, and keeping them shut was to mean a negative. A series of exhaustive questions were then put to him, which he answered in the way above indicated. In this way the solicitor received instructions for the preparation of the will, and it was executed or assented to in the same manner. The will being contested by a legatee under a former will, it was held that this will, so singularly prepared and assented to, was properly executed, and probate was granted.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] THE KING *v.* HARRON. [Oct. 26, 1903.
Criminal law—Obstructing distress—Onus on Crown to prove legality of distress—Criminal Code, s. 144 (2).

Sec. 144 (2) of the Criminal Code enacts that "every one is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress."

Held, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear.

J. H. Moss, for prisoners. *Cartwright*, K.C., for the Crown.

Full Court.] THE KING *v.* BULLOCK AND STEVENS. [Oct. 26, 1903.
Criminal procedure—Several charges—Hearing evidence on second before deciding first—Conviction.

The prisoners were charged before the County Judge on two separate charges of receiving, on two separate days, stolen goods, knowing them to be stolen, and of house-breaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge on Dec. 23, the judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On Dec. 30 he tried them on the third charge and acquitted them on it. On Dec. 31 he sentenced them on the first two charges. The judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biased on the latter, by the evidence given on the first.

Held, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the person charged, and in respect to the principal witness, and also in view of what the learned judge stated, and notwithstanding the expediency of not mixing up criminal charges, the convictions should be upheld.

Kelleher, for prisoners. *Cartwright*, K.C., for Crown.

From Divisional Court.]

[Nov. 4, 1903.]

RANDALL v. OTTAWA ELECTRIC LIGHT CO.

Accident—Live electric wire—Contact with—Negligence—Privity of contract—Contributory negligence.

The defendants, electrical engineers and contractors, had contracted to illuminate certain buildings and for such purpose had arranged with an electric company for the supply of electric current. To enable such current to be transmitted the defendants had strung wires on existing telegraph and telephone poles, their wires being some distance below the other wires, and were fastened to glass insulators with tie wire, the ends of which were some two or three inches long and were not protected by any insulating covering. The plaintiff and two other employees of the electric company were engaged in putting up for the company an electric transformer for the transmission of electricity to adjacent premises, but as to which the defendants were in no way interested, and while working on the pole the plaintiff's hands came into contact with one of the ends of the tie wire, which, by reason of the absence of such insulating covering, had become a live wire, whereby the plaintiff received a shock and he fell to the ground and was injured. The plaintiff well knew of the dangerous character of the work and the likelihood of there being live wires, and that the rule of the company in such cases was that rubber gloves should be worn.

Held, that no negligence on the defendants' part was proved, for no duty was cast upon them with regard to the plaintiff who was not their employee, and the work, which was being done, was not on their behalf; and that even if negligence on the defendants' part could be assumed, the plaintiff was guilty of such contributory negligence as would preclude his recovering.

Riddell, K.C., and *Chas. Murphy*, for appellant. *H. M. Mowat*, K.C., and *Fripp*, for respondent.

Full Court.]

[Nov. 15, 1903.]

WALKERVILLE MATCH CO. v. SCOTTISH UNION CO.

Insurance—Signature by agent per procuratorem.

Delegatus non potest delegari. Therefore defendants held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company.

A. H. Clarke, K.C., for appellant. *O. E. Fleming*, for respondent.

Full Court.]

[Nov. 15, 1903.]

HINDS v. TOWN OF BARRIE AND REUBEN WEBB.

Practice—Joinder of defendants—Rules 186, 187—Separate cause of action.

Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate.

In this case the plaintiff sued for the obstruction of a water course which passed through her property, causing it to be overflowed. The town was charged by the plaintiff with having increased the volume of water, while also obstructing the water-course. Webb was charged with having obstructed the water-course where it passed through his land. And it was charged that the natural effect of the concurrent acts of the defendants was to cause the water to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission.

Held, that the plaintiff must elect against which of the two defendants she would continue the action.

Douglas, K.C., for appellants. *Creswicke*, for respondent.

From Co. Court, Oxford.]

[Nov. 16, 1903.]

IN RE McDONALD AND TOWN OF LISTOWEL

Registry Laws—Amendment of registered plan—Petition to County Court Judge—Jurisdiction of Judge of another county—Local Courts Act—Evidence on petition—Affidavits—Merits—Order refusing to re-open—Appeal.

A petition under s. 110 of the Registry Act, R.S.O. 1897, c. 136, for an order amending a plan of land in a town, by closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay.

Held, 1. The Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of a County Court in any case where application is made him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R.S.O. 1897, c. 54.

2. Although the application to amend the plan is by petition and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, *vivâ voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.

3. Upon the merits, the order of the Judge amending the plan was justified, the portion of the street in question never having been opened

or used as a highway, and the lands abutting on both sides being owned by the petitioner.

4. No appeal lies to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence.

Order of Judge of County Court of Oxford affirmed.

D.L. McCarthy, for the appellant. *Douglas*, K.C., for the respondent.

From Meredith, C.J.C.P.]

[Nov. 16, 1903.]

EACRETT v. GORE DISTRICT MUTUAL INS. CO.

Fire insurance—Policy on goods—Partial loss—Other insurance—Proportionate payment—Conditions of policy—Construction—Over-valuation.

The insurance was upon goods valued in the application at \$15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with the loss of \$6,250. The defendant's policy was for \$3,000; there was other insurance to the amount of \$7,000, and the total value of the goods at the time of the fire was \$9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was endorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

Held, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amounts of his loss in accordance with statutory condition No. 9.

Judgment of MEREDITH, C.J.C.P., affirmed.

Riddell, K.C., and *Rose*, for appellants. *Gibbons*, K.C., for respondent.

From County Judge.]

[Nov. 30, 1903.

MacLennan, J.A.] RE VOTERS' LIST, TOWNSHIP OF RAWDEN.

Voters' Lists—Notice to strike off names—Non-compliance with form—Amendment.

It is not essential that the form given in Ontario Voters' Lists Act, R.S.O. 1897, c. 7, for objections to the names wrongly inserted on the voters' list should be followed with exactness, all that is required being that the nature of the objections to the names should be stated with reasonable clearness. Where, therefore, in giving notice of the wrongful insertion of names placed on the voters' list, the complainant used List No. 2 of Form 6 in the schedule, being the list for persons wrongfully named, instead of list No 3, being the list for those wrongfully inserted on the voters' list, but it was quite apparent what the grounds of the objections were, the notice is sufficient. An amendment in such case might be made if such was necessary.

R. A. Grant, for complainant. No one contra.

From Osler, J.A.]

[Dec. 7, 1903.

IN RE NORTH NORFOLK PROVINCIAL ELECTION.

SNYDER v. LITTLE.

IN RE NORTH PERTH PROVINCIAL ELECTION.

MONTIETH v. BROWN.

Parliamentary elections—Controverted election petition—Application to fix day for trial—Delay—Extending time for trial—Grounds for—Discretion—Appeal—Form of order.

The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from March 10 to June 27. On Nov. 5 applications were made by the petitioners to a judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other judges on the rota, and the difficulty of immediately communicating with them, the judge was unable then to fix dates, and the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th Nov. the petitioners moved before the same judge (one of the Judges of the Court of Appeal) for, and obtained orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the court would fix days for trial suitable to the judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made bona fide and not for delay.

Held, that the applications to the rota judge were in time to enable the trials to be commenced within six months from the date of the presentation of the petition (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota judges.

It was not open to the respondents to complain of lack of diligence by the petitioners within the six months, no days for trial having been fixed.

Much of what was necessary to be shewn on the application to extend the time, transpired in the presence of the judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications.

And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the judge rightly exercised his discretion upon sufficient grounds and for sufficient reason appearing before him, and his orders should not be interfered with.

The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial.

Mabee, K.C., *H. L. Drayton* and *Slaght*, for the appellants. *Baird* and *Ryckman*, for the petitioners.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] IN RE SOMBRA PUBLIC SCHOOL [Nov. 2, 1903.
Public Schools—Selection of site—Arbitration and award.

Under s. 34 of the Public Schools Act, I Edw. VII. c. 39 (O.), the arbitrator appointed in consequence of a majority of the ratepayers at a special meeting differing from the trustees as to the suitability of the site for a school house selected by the trustees can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site.

Middleton, for applicants. *Riddell*, K.C., and *Carscallen*, for respondents.

Boyd, C.] BURDETT V. FADER. [Nov. 4, 1903.
Injunction—Debtor disposing of property—Status of creditor—Verdict for damages—Fraud.

The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the

defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

D. O'Connell, for plaintiff. *R. D. Gunn*, K.C., for defendant.

Boyd, C.]

[Nov. 5, 1903.

TORONTO GENERAL TRUSTS CORPORATION V. CENTRAL ONTARIO R.W.CO.
Railway—Mortgage on undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act.

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by sub-ss. 17 and 24 of the Real Property Limitation Act, R.S.O. 1897, c. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are in effect documents under seal—the bond under seal containing a covenant for payment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

G. T. Blackstock, K.C., and *T. P. Galt* for the defendants Blackstock and Weddell. *J. H. Ross*, for defendant Ritchie. *D. L. McCarthy*, for plaintiffs.

Boyd, C.] FORBES V. GRIMSBY PUBLIC SCHOOL BOARD. [Nov. 5, 1903.

Public Schools—Purchase of site and erection of building—Funds provided by council—Proceeds of old site and building—Title to land—Expropriation—Agreement with tenant for life.

Although, as decided in *Smith v. Fort William Public School Board*, 24 O.R. 366, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under s. 76 of the Public School Act, 1901, but may also use other moneys they have under control in the shape of rent and the proceeds of the old school house and site. The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under s. 39 of the Act.

Young v. Midland R.W.Co., 22 S.C.R. 190, followed.

Marsh, K.C., and *Pettit*, for plaintiff. *Lynch-Staunton*, K.C., for defendants.

Boyd, C.]

TAYLOR V. TAYLOR.

[Nov. 9, 1903.

Writ of summons—Substitutional service—Motion to set aside—Status of applicant—Solicitor.

Where a solicitor who was served with the writ of summons for the

defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service :—

Held, that he had no locus standi.

The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.

Semble, that if the solicitor was not acting for and in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him ; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent.

Decision of Master in Chambers, 39 C.L.J. 755, affirmed on different grounds.

W. J. Elliott, for solicitor. *H. D. Gamble*, for plaintiff.

Boyd, C.]

[Nov. 9, 1903.

IN RE OLIVER AND BAY OF QUINTE R. W. CO.

Costs—Railway—Expropriation—Abandonment.

The word "desist" in C.S.C. c. 66, s. 11, sub-s. 6, has the same meaning as "abandon" in 51 Vict. c. 29, s. 158 (D), i. e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference ; if the railway company ceases operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the landowner.

Widder v. Buffalo and Lake Huron R. W. Co., 24 U.C.R. 234, applied and followed.

Marsh, K.C., for owner and mortgagee. *Middleton*, for company.

Boyd, C.]

CHITTICK v. LOWERY.

[Nov. 9, 1903.

Fi. fa. lands—Sale of equity of redemption—Purchase by execution creditor—Subsequent conveyance to debtor—Covenants—Incumbrances—Release.

Under a writ of fi. fa. against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the fi. fa. was founded. After holding the interest acquired by the purchase for a year he sold it to the mortgagor, and made to him the usual short form conveyance under R.S.O. 1897, c. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd Aug., 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and there-

fore an alias writ of fi. fa. lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage.

Held, that the land was not affected by the judgment and execution. While the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the fi. fa.; and the statutory covenants, No. 4, as to encumbrances, and No. 8 as to the release of all claims contained in the conveyance by the purchaser to the mortgagor did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance.

J. Bicknell, K.C., for defendant Stovel. *Hewson*, K.C., for defendant Lowery and subsequent mortgagees. *D. L. McCarthy*, for plaintiff.

Britton, J.] IN RE PAKENHAM PORK PACKING CO. [Nov. 7, 14, 1903
*Company—Winding-up—Action for calls—Counterclaim for rescission—
Leave to proceed refused—Leave to appeal.*

Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus.

Held, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order was refused, but leave to apply again was reserved.

Dictum of Strong, C.J., in *Re Hess Manufacturing Co.*, 23 S.C.R. 644, at pp. 665-6, explained.

Leave to appeal from the order of a judge in court affirming the dismissal by the referee of the application for leave to proceed was refused.

George Bell, for William Gorrell. *S. B. Woods*, for the liquidator.

Ferguson, J.]

[Nov. 11, 1903.

SMITH v. GRAND ORANGE LODGE OF BRITISH AMERICA.

*Life insurance—Medical examination—Misstatements and concealments—
Materiality—Breach of warranty—Cancellation of policy.*

In the plaintiff's application to the defendants for a policy of life assurance he warranted, amongst other things, that the answers in the medical examination which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon.

In the examination the plaintiff stated, that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of la grippe, for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing.

Held, that these statements and concealments were material and constituted a breach of warranty, and therefore the policy was void.

Judgment was given for the defendants in their counterclaim for delivery up of the policy to be cancelled.

John MacGregor and East, for plaintiff. *Worrell*, K.C., for defendants.

Maclaren, J.A.]

[Nov. 14, 1903.

IN RE CLARKE, TORONTO GENERAL TRUSTS CORPORATION v. CLARKE.

Trusts and trustees—Investments—Realization—Tenants for life—Remaindermen—Apportionment—Election—Rate of interest.

A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue, after payment of debts, etc., should be divided equally among her four children, three daughters and one son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix, being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the time the son executed a deed to the trustees in which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease, renewable. When the lease expired in 1893 it was renewed for 21 years at \$1,850 a year. The lessee made default in 1894 and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In Nov., 1902, a sale was effected for \$47,500.

Held, following *In re Cameron*, 2 O.L.R. 756, that the life tenants were entitled to some portion of this sum.

But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants, then in effect, elected to treat this property as a satisfactory investment.

The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.

Walters v. Solicitors for the Treasury, [1900] 2 C. 107, followed.

An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced \$47,500 on the 15th Nov., 1902, interest being calculated at four and one-half per cent. per annum with half yearly rents, and credit being given for the sums actually received by the life tenants from the rents accruing during that period.

A. Fasken, for trustees. *Riddell*, K.C., for life tenants. *Harcourt*, for infant remaindermen.

Master in Chambers.]

[Nov. 18, 1903.

CONFEDERATION LIFE ASSOCIATION V. MOORE.

Practice—Motion to set aside order for service out of jurisdiction—Stay of proceedings.

A notice of motion to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that time to enter appearance does not run in the meanwhile.

Kilmer, for plaintiff. *Middleton*, for defendant.

Meredith, C.J., MacMahon, J., Teetzel, J.]

[Nov. 21, 1903.

TRAVISS v. HALES.

Husband and wife—Liability of husband for torts of wife.

Held, affirming the judgment of STREET, J., that a husband is still liable for the torts of his wife if the marriage takes place before July 1, 1884. The provisions of the Married Women's Property Act, 1884, 47 Vict. 19 (O.), applicable to persons married before that date, do not relieve him from liability.

Earle v. Kingscote, (1900) 2 Ch. 585, applied and followed. *Amer v. Rogers*, 31 C.P. 195, overruled. *Lee v. Hopkins*, 20 O.R. 666, approved.

McDiarmid, for defendant Richard Hales. *J. W. McCullough*, for plaintiff.

Osler, J.A.]

IN RE WILSON.

[Nov. 21, 1903

Assignments and preferences—Motion to remove assignee for benefit of creditors—Notice of motion—Grounds—Evidence—Proposed examination of assignee—Judicature Act and Rules.

Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, c. 147, to remove an assignee for the

benefit of creditors, the notice of motion should state the grounds, or they would at least appear in the material filed in support of the application.

The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it.

A. C. McMaster, for applicants. *D. L. McCarthy*, for assignee.

Meredith, C.J.C.P., MacMahon, J.]

[Nov. 26, 1903

MCCORMACK *v.* GRAND TRUNK R.W. CO.

Railway—Carriage of goods—Liability for loss—Dog—Common carriers.

The defendants are, by the Railway Act, 51 Vict. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him.

Distinction between the English and Canadian Railway Acts pointed out.

Judgment of the County Court of Wentworth affirmed.

J. W. Nesbitt, K.C., for defendants. *Washington*, K.C., for plaintiff.

COUNTY COURT—HALDIMAND.

REX *v.* DEALTRY.

Liquor License Act—Conviction for third offence—Enquiry as to previous convictions—Necessity for first finding as to subsequent offence.

Sec. 101, sub-s. 2, of the Liquor License Act, which provides for the case of previous convictions, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof he shall then, and not before, be asked whether he was so previously convicted."

Held, following *Regina v. Edgar*, 15 O.R. 142, that the language of the section is peremptory, and therefore to give a magistrate jurisdiction thereunder to enquire as to previous convictions he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a third offence, this was not done, but the previous convictions were enquired into and admitted by the defendant on cross-examination. The conviction was therefore quashed.

[Cayuga, Nov. 20, 1903.—Colter, Co. J.]

Appeal from a conviction made by Thomas Rice, police magistrate for the town of Dunnville, on Oct. 27, 1903. The defendant was tried before the above named police magistrate on a charge as a third offence of

having sold liquor during prohibited hours on Saturday, Sept. 5, 1903; the two previous convictions having been alleged for a similar offence, the first on Feb. 11, 1899, and the second on July 16, 1903. While the defendant was being cross-examined as a witness for the defence the counsel for the prosecution asked him whether he had been convicted as alleged in the information, which he admitted. A conviction was then recorded against the defendant as a third offence, and a fine of \$80 and \$36.92 costs imposed. The defendant appealed to the County Judge in Chambers.

Haverson, K.C., and John C. Eccles, for the appellant. J. Murphy and J. F. McDonald, contra.

The learned judge reserved judgment on the legal objections raised; the evidence to be taken de novo should the objections be overruled.

COLTER, Co. J.:—Several objections were taken to the conviction by counsel for the appellant and these were all serious. The Legislature has laid down certain rules and regulations to be observed in such cases. It is not the duty of the magistrate or judge to consider, nor has he any right to consider, whether these regulations are wise, prudent, or necessary; it is incumbent upon him simply to obey them. Sec. 101 of the Act is headed in large type, and prescribes not only what should, but what *shall*, be done in all such cases. Sec. 8 sub-s. 2, of the Interpretation Act (R.S.O. c. 1) says "the word *shall* shall be construed as imperative and the word *may* as permissive.

The language used in sub-s. 1 of sec. 101 of the Liquor License Act is as imperative as words can make it. Not only does the word *shall* occur therein, but the word *may* is also present there in the sixth line in a different sense. The word *then* in the third line of this sub-section is grammatically an adverb, meaning at that time. In the construction of statutes and wills it is sometimes interpreted differently. Its meaning in this section is, however, emphasized by putting immediately after it the words *and not before*, to indicate that in this section it is an adverb, meaning at that time, or subsequently, and not before. When the Legislature has prescribed the duties of the justices or police magistrate so positively and has gone to the extreme of being ungrammatical in the ordinary sense in order to make its wishes clearly known and understood, I am compelled to give effect to its directions. More particularly in cases of a criminal or penal character it is incumbent on the prosecution to conform exactly to the provisions of the statute. It is surely not too much to ask of the presiding magistrate or justice of the peace that he should read over carefully the section of the statute under which proceedings are taken, and that he should follow the directions prescribed as carefully as possible. It is not proper to substitute his own views for those prescribed.

If I were to give effect to this conviction I would be obliged to repeal for the purpose of this case the section in question. This of course I have neither the power nor the inclination to attempt to do.

In my opinion also it is dangerous to devote too much attention to fathoming the motives of the Legislature. Where its mandates are expressed clearly it is the duty of the court to follow them regardless of the consequences. If an amendment to the language of the Act is necessary it should be made by the Legislature and not by the Court.

The judgment in *Regina v. Edgar*, 15 O.R. 142, is, in my opinion, not only well considered but unanswerable. It is exactly to the point, and I am prepared to follow it unhesitatingly.

Regina v. Brown, 16 O.R. 41, goes off largely on another point. The language used at the close thereof indicates an expression of opinion, "it seems to me that sec. 101 is directory only." In this latter case the court's attention was not squarely directed to the issue involved in the case before me.

I therefore quash the conviction and allow the appeal without costs. The prosecutor may have a certificate of protection if it be deemed necessary.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

MILLIGAN *v.* CROCKET.

[Nov. 27, 1903.

Cause called out of its turn on docket and jury empannelled in absence of defendant.

This cause stood forth on the docket of the St. John Circuit. The first cause having gone over to a later circuit, and the second and third causes having been passed over, but not struck off, for the reason that the attorneys were not prepared to go on at the moment, the plaintiff's counsel moved for trial in this cause in the absence of the defendant, his attorney and counsel. The jury was empannelled and the examination of one witness concluded before counsel for the defendant appeared. The latter asked for his right of challenge, which the trial Judge said he could not grant without the consent of the plaintiff, who refused it.

The Court granted a new trial on the ground that the cause was called out of its turn on the docket and the jury empannelled in the absence of the defendant, his attorney and counsel.

H. A. McKeown, Sol. Gen., for plaintiff. *O. S. Crocket*, for defendant.

En Banc.]

MACRAE *v.* BROWN

[Nov. 27, 1903.

New trial on terms—Appeal as to costs.

The jury on the writ de proprietate probanda in an action of replevin in the Northumberland County Court found for the defendant. On the trial

afterwards the finding was in favour of the plaintiff for the value of the goods. The defendant moved for a new trial, which the Judge granted on payment of costs. From this judgment defendant appealed.

The Court dismissed the appeal, holding that it involved only a question of costs.

G. W. Allen, K.C., for appellant. *A. R. Slipp*, for respondent.

En Banc.]

EX PARTE MCGOLDRICK.

[Nov. 27, 1903.]

Review from inferior Court—Power to review on question of fact where debt under forty dollars.

In an action in The Small Debt Court of Fredericton to recover a balance on contra accounts between plaintiff and two defendants, who were partners, the defence being that the partnership was discharged by the plaintiff's acceptance from one of the members of the firm after its dissolution of his individual promissory note in satisfaction of the debt, the jury, found for the plaintiff. On review before a Supreme Court Judge the latter ordered a new trial. On the second trial the verdict was for the defendants. The plaintiff obtained an order for review from the County Court Judge and the latter set aside the verdict and ordered a verdict for the plaintiff for the full amount of his claim.

Held, on motion to make absolute a rule nisi to quash on certiorari, that, the amount of the claim being less than forty dollars, the County Court Judge had no power to review the finding of the jury, the issue being entirely one of fact.

Rule absolute to quash review order with directions to County Court Judge to dismiss the review with costs.

O. S. Crocket, in support of rule. *J. H. Barry*, K.C., contra.

En Banc.]

McCOY v. BURPEE.

[Nov. 27, 1903.]

Action for use and occupation—Eviction.

Plaintiff let to defendant a farm of about 250 acres for one year, from May 1, 1901, at \$250, payable half yearly, and in case of "a chance to sell" agreed to give him the refusal. Defendant went into possession and occupied the buildings for the whole year. In Sept. 1901, however, plaintiff sold the farm, all but 4 or 5 acres, on which the buildings were situated, to one H., who a few weeks later re-sold to the Dominion Government for a rifle range. Before the deeds were executed surveying parties went over the premises and laid out roads and other work for the location of the proposed range. Construction work was begun that fall and continued in the following spring before the expiration of the defendant's tenancy.

Defendant paid the first six month's rent but in an action to recover for the last six months he alleged that the acts referred to were done without

his consent. The County Court Judge held they were no answer to the action.

Appeal from this judgment allowed with costs.

A. R. Slipp, in support of appeal. *R. W. McLellan*, contra.

En Banc.]

HANSON v. CADWALLADER.

[Nov. 27, 1903.

Company promoters—Joint debtors—Action against one.

In an action in the York County Court to recover a charge for land surveying defendant denied plaintiff's testimony that he (deft.) employed plaintiff, and deposed that the hiring was made by one, D. who was interested with him in the promotion of a mining company, in connection with which the land was surveyed. D. also testified that he, and not the defendant, made the contract, but both D. and the defendant swore that they were equally interested in the promotion of the company and had agreed together to share the expenses equally in case the company should refuse to re-imburse them. The County Court Judge, who tried the cause without a jury, found a verdict for the plaintiff without finding as to whether the contract was made by the defendant or by D. holding that it made no difference in law by which of the two plaintiff was employed, as they were joint debtors and the defendant would be liable in this action, there being no plea in abatement.

Held, on appeal, that the County Court Judge was right.

Appeal dismissed with costs.

R. W. McLellan, for appellant. *O. S. Crocket*, for respondent.

En Banc.]

EX PARTE BRAMWELL.

[Nov. 27, 1903.

Review of judgment of Inferior Court—Certiorari.

In an action to recover rent in the St. John City Court defendant set up that plaintiff's husband agreed to cancel the lease and relieve defendant from a date prior to the period for which the rent was claimed. Plaintiff alleged that her husband had no authority to do this, though he was authorized to collect rents and make repairs. The magistrate found for the plaintiff. On review before the St. John County Court Judge the latter reversed the verdict.

Held, on motion to make absolute a rule nisi to quash the review order on certiorari that there was no evidence of authority to the husband to make the agreement alleged; and that, even if there were any evidence, the magistrate must be taken to have found against it, and that the review Judge should not have disturbed the judgment.

Rule absolute to quash with directions to the review Judge to dismiss the review with costs.

E. R. Chapman, in support of rule. *S. Alward*, K.C. contra.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.] VON DUSEN-HARRINGTON CO. v. MORTON. [Nov. 11, 1903.
Principal and agent—Purchase of shares on margin—Sale by broker without notice—Acquiescence.

Action to recover the amount of the plaintiff's loss on the purchase and sale of a number of shares on the New York stock exchange bought by them for defendant on a margin of three per cent. The contract between plaintiff's agent at Winnipeg and defendant was a verbal one, but the next day defendant received the usual notice in writing of the transaction in which some of its terms and conditions were thus stated. "All transactions for your account contemplate the actual receipt and delivery of the property and the payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the right of substituting other responsible parties as principals with you in above trades at any time until closed in accordance with the rules of the Board of Trade or the Chamber of Commerce where the trades are made," which notice had at the foot the printed signature of the plaintiff's company. Shortly after the purchase the price of the shares began to fall and the margin became so small that the plaintiff's manager at Winnipeg telegraphed the defendant at Gladstone to send \$500 additional margin, and later on the same day the margin being entirely lost, he telegraphed defendant to put up \$1,000 further margin. Defendant replied to these telegrams, "Will attend message, down to-morrow." The manager waited until delivery of the mail from Gladstone the next morning when, not having heard from defendant, he telegraphed to have the shares sold which was done at a loss of \$1,150. The original order for purchase was telegraphed to the plaintiff's head office in Minneapolis. From there it was telegraphed to the plaintiff's agents at Chicago who forwarded it to their agents in New York. These last telephoned the order to a firm of stock brokers who transmitted it to their agent on the floor of the stock exchange when the shares were purchased. The defendant was advised of the purchase and the price within an hour. The sale of the stock was made through the same agencies and defendant was verbally notified of it on the day after it took place.

Held, 1. There was an actual purchase of the shares for him, as it was shewn that the plaintiff's agents in New York from the time of the purchase until the sale, always had on hand the number of shares of that particular stock ready to deliver on payment of the full price, and it was not necessary that the shares should have been actually transferred on the books of the company either to the defendant or to the plaintiffs. It could not have

been intended that this should have been done because it was contemplated that the shares should be sold in the same market for defendant's benefit at a moment's notice in case of an increase in price satisfactory to him.

2. There was an actual sale of the said shares on account of defendant regularly made, according to the usage of trade in that behalf.

3. The plaintiffs were entitled under the terms of the notice sent to the defendant to sell the shares without notice to him when the margin was gone, as the defendant, not having made objection to these terms, must be taken after a reasonable time, to have assented to them.

Stewart Tupper, K.C., and *Phippen*, for plaintiffs. *Howell*, K.C., and *Phillipps*, for defendant.

Perdue, J.]

LOGAN V. REA.

[Nov. 26.

Fraudulent conveyance—Exemptions—Lien of registered judgment as against land—Proceedings to realize while debtor in occupation—Declaration of right without order for sale—The Judgments Act, R.S.M. 1902, c. 91, s. 9.

This action was brought to have it declared that a certain parcel of land conveyed by the debtor to her son before the recovery of the plaintiff's judgment in reality belonged to the debtor, and that the son held the land only as trustee for the mother and had no interest in it, and that the judgment formed a lien or charge on the land, and asked that the land be sold to satisfy the judgment. Defendants admitted that the land was the mother's and that the son had no interest in it and that the conveyance had been made solely because the mother thought she might thereby prevent the sale of the land to realize the plaintiff's claim, but they set up and proved that it was her actual residence and home, and claimed that as it did not exceed \$1,500 in value it was exempt from the proceedings, by virtue of R.S.M. 1902, c. 91, s. 9. It was urged on behalf of the plaintiff that the conveyance was fraudulent and void as against him, and that the debtor had by conveying the land to her son deprived herself of the benefit of the exemption, according to *Roberts v. Hartley*, 14 M.R. 284, and *Merchants' Bank v. McKenzie*, 13 M.R. 19.

Held, that the plaintiff was entitled to a declaration that the land was the property of the debtor, so that, if the exemption should at any time lapse, the judgment might be enforced against the land, but was not entitled to a present sale of the land to realize his judgment.

Roberts v. Hartley distinguished on the ground that there both the grantor and grantee united in asserting the reality of the transfer and no trust in favour of the grantor was alleged or proved by him. The right given by The Judgments Act to a debtor to claim exemption in respect of his actual residence is clear and positive and applies to his interest in the property so long as he continues to occupy it, whether that interest is

legal or only equitable; and if the debtor, having an absolute interest, converts it into an equitable one but still continues to hold and reside on the land, the exemption is not lost. Even if the debtor's object in making the conveyance was to obtain a protection which the law had already conferred on him, he does not thereby lose the right given him by the statute, as the placing of the property in the name of a trustee for him would not injure the present rights of the creditor as long as the trusteeship is admitted.

Pitbaldo, for plaintiff. *Taylor and Anderson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE PROVINCIAL ELECTIONS ACT. [July 24, 1903.
Elections Act—Application for registration—Affidavit—Official to take.

Questions referred, under s. 98 of the Supreme Court Act, by the Lieutenant-Governor in Council to the Full Court for determination. Sec. 3 of the Elections Act Amendment Act of 1901 provided a form of affidavit or application for registration as a voter, the jurat of which being given thus: "Sworn (or affirmed) before me at _____ in the Province of British Columbia this _____ day of _____ A.D. 19____", and s. 4, provided that the affidavit might be sworn before (amongst others) any Justice of the Peace, Mayor, Notary Public, Postmaster, Government Agent, Constable or Commissioner for taking affidavits in the Supreme Court. The main questions argued were as to whether or not the affidavit could be sworn outside the Province and if it could, what officer could take it.

Held, 1. The affidavit might be sworn outside the Province, and the jurat altered to conform to the facts.

2. It might be sworn before a Commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in s. 4 provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the Province.

Per IRVING, J.: It might be sworn before a foreign Notary Public.

Per WALKER and DRAKE, J.J.: Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters.

The Lieutenant Governor in Council has power (under s. 210 A. of the Act, and s. 11 of the Redistribution Act) to make regulations providing that affidavits sworn outside the Province may be received by Collectors of Voters and the applicant's name be placed on the register.

Duff, K.C., and *Helmcken*, K.C., and *Belyea*, K.C., for the various parties.

Full Court.]

[Nov. 9, 1903.]

MORGAN v. BRITISH YUKON NAVIGATION CO.

Merchants Shipping Act—Medical attendance—Duty of ship owner to provide.

Appeal from an order of WALKEM, J. This was an action by a seaman for damages while in the discharge of his duties on the defendant's steamer, the Yukoner. After the statements of claim and defence had been delivered the plaintiff applied for leave to amend his statement of claim by adding an allegation that "under the provisions of the Merchants Shipping Act, 1894, s. 207, and s. 209 of the Criminal Code 1902, and otherwise at law the company were under a legal duty, without undue delay, to provide necessary surgical and medical advice and attendance and medicine and to maintain the defendant until cured, and to defray the expense of all necessary medical and surgical advice, attendance and appliances," and a claim thereunder for additional damages. On the hearing of the summons WALKEM, J., refused leave to make the proposed amendment.

Held, by the Full Court dismissing the appeal that a ship owner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company.

A. D. Taylor, for appellant. R. Cassidy, K.C., and C. McL. O'Brian, for respondent.

Hunter, C. J.]

[Nov. 24, 1903.]

CENTRE STAR MINING CO. v. ROSSLAND AND GREAT WESTERN MINES.

Practice—Proceedings outside Victoria, Vancouver or New Westminster—Chamber summons returnable at one of these places—Must be issued at place returnable.

The action was commenced in the Rossland Registry and the defendants issued a summons out of that Registry, but returnable in Vancouver, asking that the writ be set aside. S. 32 of the Supreme Court Act as amended in 1901 (c. 14, s. 13) provides that in proceedings commenced in any Registry other than Victoria, Vancouver or New Westminster, any application may be made in Victoria, Vancouver or New Westminster.

Held, that a summons under this section must be issued out of the Registry at which it is returnable. Summons set aside with costs.

Davis, K.C., for summons. Tupper, K.C., contra.

North-West Territories.

SUPREME COURT.

Scott J.] STIBSON *v.* ROSS. [Nov. 21, 1903.
Security for costs—Agent—Affidavit of advocate insufficient.—Rule 520.

Held, on an application for security for costs under Rule 520 which provides for obtaining a summons to shew cause when "the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action." That the agent must be some one having personal knowledge of the facts. That the allegation of the existence of a good defence must be positive. That an affidavit by the defendant's advocate that he verily believes the defendant to have a good defence to the action on the merits is insufficient.

C.F. Newell, for plaintiffs. *O.M. Biggar*, for defendants.

Scott J.] SASKATCHEWAN LAND CO. *v.* LEADLEY. [Nov. 23, 1903.
Action commenced in wrong subjudicial district—Transfer—Chamber summons—Irregularities—Rules 538-540.

Where an action was entered in the office of the Deputy Clerk of the Northern Alberta Judicial District at Edmonton but the cause of action did not arise nor do any of the defendants reside in his subdistrict, some of the defendants residing in the remaining portion of the district under the jurisdiction of the Clerk at Calgary, in which also the lands in question are situate, and others residing in the Province of Ontario.

Held, on an application to set aside the writ of summons, injunction order and other proceedings, that although the entry of the action with the Deputy Clerk at Edmonton was unauthorised under s. 4. sub-s. 2. of the Judicature Ordinance (C. O. 1898 C. 21) it is not a nullity, but merely an irregularity and the defect might be cured under Rule 538 by transferring the cause to the office of the Clerk at Calgary.

Held, also, against the contention of the plaintiff, that an irregularity in the summons to set aside the proceedings, in not stating the objections relied upon, pursuant to the Rule 540 is not sufficient to discharge the same but will entitle the opposite party to an enlargement to answer the objections.

Beck, K. C. for plaintiff. *G. W. Greene* and *O. M. Biggar*, for defendants.

 COURTS AND PRACTICE.

BRITISH COLUMBIA.

Appeal Books: During the hearing of an appeal recently in the Supreme Court it appeared that the regulations in regard to the preparation of appeal books, issued by the judges on February 23, 1903, had been ignored. The Court announced that no costs would be allowed for the preparation of appeal books unless prepared in accordance with the regulations, and the Registrar was directed not to receive them in future unless so prepared.

 ONTARIO.

Judicial Appointments.—H. D. Leask, of Sturgeon Falls, barrister, to be Junior Judge of the District Court of the Provisional District of Nipissing, and to be Local Judge of the High Court.

QUEBEC.

Judicial Appointments.—J. A. C. Madore, K.C., of Montreal, to be a Puisne Judge of the Supreme Court.

 Book Reviews.

Political appointments, Parliaments and the Judicial Bench of the Dominion of Canada. Edited by N. Omer Coté, of the Department of the Interior, Ottawa.

Mr. Coté has issued a supplement to his very useful handbook on the above subjects. It is a continuation up to 30th June, 1903, of the work published in 1896 for the period extending from 1st July, 1867, to Dec. 31st, 1895. If our readers have not as yet got the two volumes they should do so at once. They contain a mine of information excellently arranged on subjects of every day interest.

The Living Age. Boston, U.S.A. There have been some excellent selections in this serial lately, keeping the reader well informed upon all the great important questions of the day and giving a range of thought expressed by some of the best writers of the day not to be found elsewhere. The only improvement we could suggest would be to give some fiction better than rubbishy French novels. Possibly however some people may like them.

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There is as yet no sign of the appointment of judges to compose the Bench of the new Exchequer Division of the High Court of Justice of Ontario. It was said that there was an imperative need of this additional strength to the Supreme Court judiciary of this Province. But if all judges were restricted to the duties properly belonging to their position, and if those not physically able for their work were given a proper retiring allowance, there never would have been any question as to this.

One of the most important public positions in the gift of the Dominion Government has just been filled by the appointment of one eminently fitted for it. Under the Railway Act of last session there was constituted a Board of three Commissioners, of whom it was agreed that one (the Chairman) should, very properly, be a lawyer. This Board has large judicial powers, as well as an extended control over freight rates and other matters relating to railways. It was therefore very fitting that the Government should offer the Chairmanship of the Board to one so competent as the late Minister of Railways and Canals, the Honorable Andrew G. Blair, K.C., who, as Minister, was not only familiar with the management of our National Railway—the Intercolonial, but who has necessarily a varied and extensive experience in railway matters which will add largely to his usefulness. When Mr. Blair resigned the Premiership of New Brunswick to become a Minister of the Crown at Ottawa he was the leading counsel of his Province. His ability as a lawyer will be a source of great strength to the personnel of the Board. The fact of his resigning the portfolio of Railways and Canals because he could not agree with the Cabinet in its Railway policy indicates an independence of thought and action which augures well for his future usefulness in a position where such characteristics are so essential. It is gratifying to know that Mr. Blair was willing to accept the position, and the Government can be congratulated on having secured his services.

TERRITORIAL EXPANSION OF CANADA.

If the Alaskan Boundary Award has wrought us any appreciable good whatsoever we are inclined to say that it subsists in the fact that it has written the word *Finis* to the chapter of "Colonialism" in the history of this Canada of ours. Great-minded Englishmen really wish us God-speed in taking our true national position—have we not Lord Minto's fine words now echoing in our ears from the first annual banquet of the Canadian Club in Ottawa? "If I were a Canadian I would shout 'Canada for the Canadians' with the best of you"! We have emerged from the stage of Downing Street tutelage, and claim the recognition of our untrammelled right to the management of our commerce and our territorial estate. And we feel that we may claim all this without involving the severance of that very tenuous and yet extremely tenacious tie that binds us to the mother country; for to concede what we so claim may possibly be done without the Imperial Parliament adding one iota to the autonomy Canada now enjoys, i.e., the position of a "protected State." As Mr. W. E. Hall points out in his *International Law* (3rd ed. 129), "protectorates" are new international facts; and their genera cannot be definitively grouped while political cosmogony is still in a state of flux. Therefore, we are straining no venerable definition when we venture to apply this term to Canada to-day.

We think it is not necessary here to do more in support of the view we have put forward than to refer to so authoritative a book as Lewis' *Government of Dependencies*. This book was, of course, written before the union of the British North American provinces, and consequently the author had not the opportunity of directing his criticism to the distinctive features of our constitution; but it is obvious everywhere in the book, as it originally came from the author's hand, that he would have placed Canada in a class apart from the other British possessions whose constitutions he there specifically discusses. This is made abundantly clear in the extremely able introduction by Mr. C. P. Lucas to the edition of 1891. One passage supports the point we have taken with so much force that it justifies quotation at length. After observing that Great Britain controls the foreign policy of Canada he says: "This control is exercised with the consent of Canada, not in despite of the wishes of her people; and when a

question arises, which specially touches Canadian interests, the Dominion Government has its say as representing the Canadian people, and Canadian delegates have been present at international conferences. The fact, therefore, that the foreign policy of the empire is left in charge of the Imperial Foreign Office, does not vitiate the conclusion that Canada is substantially governed by the Dominion Parliament, not by the Government of Great Britain ; but, inasmuch as foreign policy is ordinarily left to the mother country, and as the sanction of that policy lies in the strength of the British fleet, the colonies, whose relations to foreign countries are determined by the policy, and who are safe-guarded by the fleet, *are really in the position of independent but protected States.* In a word the British empire may be said to consist, partly of dependencies, which are not colonies, such as India ; partly of dependencies which are colonies, such as Barbados or the Bermudas ; *partly of colonies such as Canada, which are not dependencies but protected States."*

If it be asked just here what diplomatic machinery has Canada for the purpose of negotiating treaties with foreign powers, we answer : Is there any good reason why she should not act through the appropriate existing Imperial channels? It is the power to make the treaty that constitutes her independence of action, not the agency through which that power is exercised.

This statement of what we conceive to be the true status of Canada to-day is merely prefatory to the following observations on a present desirable expansion of our national domain.

It is obvious to the casual observer who glances at the map that our Atlantic sea-board sadly needs to be rounded out by the inclusion of the island of Newfoundland and its appendant *lisière* along the Labrador peninsula. Even if these portions of territory lacked the splendid resources of mine, forest and fishery with which they are endowed, the commercial and strategic value of their ports and harbours would justify every effort being put forth to build them into the fabric of the Dominion. Sir John Macdonald once declared with all the shrewdness and foresight of the true nation-builder that he was, that Newfoundland, from a war point of view, was the "sentinel of the St. Lawrence ;" and when we remember that she is separated from Ireland only by a distance of a little

over sixteen hundred miles, her mercantile greatness compels one to marvel at the apparent lack of fervour of the Canadian people in promoting a political union which would mean so stupendous a commercial gain to them. No matter how extravagant the price fixed by France for the commutation of her "treaty shore" rights, Canada, herself, could afford to pay it twice over in order to secure this valuable territory.

But our main concern in this article is with the acquisition of the two islands of St. Pierre and Miquelon over which France claims absolute sovereignty at the present day by virtue of cession under the Treaty of Versailles, in 1783. The military importance of these islets as a base of supplies for a foreign power is alone sufficient to incite Canada to acquire them ; but we will not enlarge upon that feature of the question. The entrance of Newfoundland into the Canadian confederation means our future commercial gain ; but the administration of the two smaller islands as a French colony in the Gulf of St. Lawrence is a present loss to our customs revenue of many thousands of dollars per year. This is due to the notorious system of smuggling in the gulf of which these two little islands constitute the chief base of operations. When statistics shew us that the imports of St. Pierre amount to some \$260 per head, as compared with \$30 per head in the Dominion of Canada, and when we further learn that the bulk of these imports are potable liquors, we recognize that howsoever bibulous the islanders may be the volume of imports is absurdly disproportionate to the possibilities of domestic consumption. If we look at the normal and legitimate trade of these islands we see at a glance that unless the inhabitants augmented their incomes by means of this illicit traffic they would soon be compelled to emigrate. France has spent millions of dollars during the past twenty years in bonusing her fishermen who go to the "treaty shore," and those who engage in *peche sedentaire* from St. Pierre and Miquelon ; yet the business of cod-fishing is a confessed failure, and had it not been for the astuteness of M. Jusserand in securing the *modus vivendi* of 1890 (one of the latest exhibits of English diplomatic blundering), which permits the prosecution of lobster fishing and the maintenance of canning factories by the French on the Newfoundland shore, the Government of France might have bonused the general fisheries to

the top of its limit and yet failed to keep its subjects on these barren islands. Therefore, it is absurd to a degree that either the French or the British should wish to maintain a status quo at once financially burdensome to the one and an embargo upon the full territorial dominancy of the other. With the present cordial relations existing between the two nations, crystallized as they were last year by an arbitration treaty, it seems to us that the Governments of Canada and Newfoundland have a most favourable opportunity to press the home Government for the opening of negotiations, looking to a surrender by France of her "treaty shore" rights, and the sale of her title to the islands of St. Pierre and Miquelon. By such a consummation Canada and Newfoundland would be greatly benefited even under existing political conditions; but with confederation *fast accompli* the advantages of it could not be easily measured.

There is this further argument in favour of the acquisition of these several portions of contiguous territory by Canada, namely, that by no reasonable extension of the Monroe doctrine can the Government of the United States object to any part of the proceeding. It is true that President Polk's gloss upon the now famous doctrine enunciated by his predecessor Monroe, at the suggestion of the English statesman Canning, has been interpreted to mean that any European power would have to obtain the consent of the United States to any acquisition of dominion in the Americas whether by voluntary cession, or transfer, or by conquest (see Dana's Notes to Wheaton's Elements, p. 102; Taylor's International Law, p. 146). But Canada does not come within the letter or spirit of this inhibition, and the burden that might rest upon Great Britain, were she purchasing *sua causa*, of establishing that this inhibition is no part of the code of international law, or that Great Britain is herself an American power and so not within the inhibition even if it were valid, would not be raised in the matter of territorial expansion here advocated.

If our view is a correct one, the expediency of prompt action in the premises by those in authority needs no demonstration.

REPRIEVES IN MURDER CASES.

A little more than a year ago a Middlesex jury, scouting the evidence of one Herbert, who had pleaded guilty to an indictment joining him as an accomplice of Gerald Sifton in the murder of his father and who afterwards became a King's witness, acquitted the principal. If without the power to intervene, the public at that time certainly possessed the will to restrain the authorities from exacting the death penalty. To-day a situation has developed in the North-West Territories which provokes them to support as heartily any effort the Crown may use in order to have a convict endure it.

One Ernest Cashel, a farm-labourer, had, with singular brutality, taken the life of a rancher named Beit, who had frequently befriended him. Being apprehended, he was tried for and found guilty of the murder, and sentenced to be hanged on the 15th December last. On the 11th he, with the opportune aid of a brace of revolvers, which had in some mysterious way been smuggled into his cell, overcame his guards, and wrenching the keys from them, passed through the door, which he instantly locked behind him, leaving his keepers to sample the indifferent cheer he was himself content to forego. He then improvised a rope out of some handy material with which he seems to have been accommodated at the same time as he gained possession of the revolvers, scaled the prison-wall and escaped.

Contemporaneously, or nearly so, with the prisoner's achievement, his counsel petitioned the Governor-General for clemency; but the prayer was refused with scant ceremony. When tidings reached him that the criminal had broken gaol, the Minister of Justice was placed in a quandary. There was no trustworthy guide to be followed, no beaten path to be trod. Precedents were sought, and text-writers consulted in the hope of light being shed on the darkness. A reprieve, on the demand of the Minister, to emanate from the trial judge was ultimately regarded as the least unpromising way out of the difficulty.

Recourse, accordingly, was had to Chief Justice Sifton, and on the 14th December, the day before that named for the execution, he made an order postponing it for a week. Complexity surrounds, without mistake, the problem thus offered for solution. Professional judgment would seem to have entered a blind alley,

whence there is no prospect of emerging. Was the course the Department followed that which the law sanctions?

A reprieve is defined by Sir Matthew Hale—modern instructors accepting the exposition—"as the withdrawing of a sentence for an interval of time, whereby the execution of a criminal is suspended." Its granting must, as a result, be understood to be the exercise of a function which extends some indulgence or benefit, or at least carries with it a possibility of such to one adjudged to suffer capital punishment. The *Encyclopædia of English Law*, bearing out this notion, amplifies the definition by introducing the words "with a view to a pardon or commutation of sentence." It may, the treatises add, be "either by the Crown, *ex mandato regis*, at its discretion, its pleasure being signified by the Court by which execution is to be awarded, or by the Court empowered to award execution, either before or after verdict, *ex arbitrio judicis*." The Crown's prerogative may in this regard, as in the related subject of pardon, be narrowed or extinguished by statutory enactment. There its deprivation will be enacted in the interest of liberty; the Habeas Corpus Act, for instance, putting the injury of causing a man's imprisonment beyond the realm outside the grace. Such being so, what should be viewed as the consequence of those paragraphs of the Code which affect reprieves? Section 937 provides "that in the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State for the information of the Governor-General; and the day to be appointed for carrying the sentence into execution shall be such, as in the opinion of the judge will allow sufficient time for the signification of the Governor's pleasure before such day, and if the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or who might have held, or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown." All these directions may be readily

enough apprehended. The Crown, to begin with, has to notify its pleasure, unless the judge enlarges the time, before the day originally set for the execution, and cannot itself defer that event; while the judge must not, where occasion for a stay is found, allow the day appointed for its carrying out to pass without proceeding to act. The most explicit assurance, however, to be derived from the section is the hard-and-fast nature of the reprieve. It is solely and purely to afford the Crown suitable facilities for dealing with an undetermined case. Now, as regards this matter, the Crown, as before intimated, had given its ultimatum. In the face of that knowledge any supposition that the practice was borrowed from the Code must be discarded. Nothing, it may be owned, is sought to be grounded on the fact of a suspension under the circumstances doing violence to the rooted understanding of a reprieve; although the giving of the name to a proceeding which, instead of promising him relief,—operates to a criminal's prejudice—which oil for him, so to speak, the wheels of doom—has about it a sufficient flavour of irony. It may be the proper estimate that the Crown is only dispossessed of the right to the extent to which Parliament has bestowed it upon the courts. In 1894, Sir John Thompson—or to be more accurate, the Governor-General on his advice (as asserted by the counsel for the prisoner, Mr. T. C. Robinette, K.C.)—respite^d McWherrell, the County of Peel murderer, by the channel of a direct communication, from June 1st of that year until October 1st—afterwards, in September, commuting his sentence to imprisonment for life. The adoption of any course by a Minister of such repute as the head, at that period, of the Department of Justice goes no little way, everyone must allow, towards establishing its validity.

Westminster Hall's records bequeath no example of the escape of a murderer lying under sentence of death, which presents even a remote analogy to that in question, though cases are furnished of condemned persons "fleeing to sanctuary" where the decision has gone forth that "the realm cannot be abjured by such means."

The point was urged, and debated with less perspicacity than freedom in the press, that, unless meanwhile reprieved, Cashel, as soon as the moment of execution arrived, whether he should have graciously lent himself to the hangman's good offices or not,

would have been defunct. Surely this represents a vulgar misconception. Sentence of death works a forfeiture of civil rights, of which an instance was given in the case of Birchall, the swearing of an affidavit by whom was not permitted. A murderer then becomes practically dead to the outside world. There could be no change wrought between sentence and execution. It might be more appropriately said that his body from the time spoken of was in a condition of insensibility, and could be galvanized into life by nothing less than a pardon.

Reference to pardons brings us to a discussion of that aspect of the Crown's position. The gratuity belongs to the Crown as a prerogative, and is incommunicable except to offshoots of the parent state. Either conditional or a free pardon may be extended, though it is difficult to comprehend what shape or direction, in the case of capital punishment, the first named would assume. Ticket-of-leave is representative of the class. Mossback interpreters allude to the substitution of a milder and pleasanter for a severer and grosser method of execution, as beheading, in lieu of hanging; and a dispensation with such paltry incidents as mutilation, or hanging in chains, as conditional pardons. Sec. 966 of the Code prescribes that "Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, by warrant under the royal sign-manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor-General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender under the great seal as to the offence for which such pardon has been granted."

Is there not a serious difficulty obtruded, if we have to look upon the change of date for consummation of the sentence as giving it the character of a new judgment, and thus requiring the presence of the criminal to hear it? One of the "orders and directions" promulgated by the King's Justices in 1708 (Kelyng, J.) was that "no prisoner convicted for any felony for which he cannot have clergy be reprieved but in open session." It has been likewise averred that "respite is matter of record, and

cannot be determined but by a new award or execution." Does not the making of the transaction matter of record necessitate a disclosure of it to the party it concerns? Hale's "Pleas of the Crown" exhibits a kindred case, that of a reprieve granted to a woman on the suggestion of pregnancy. This, with the occurrence of insanity, are the two conditions which, either seen to exist, or coming to pass after sentence, require, ex necessitate legis, its extension. The learned jurist remarks, "This reprieve is, or ought to be, matter of record, and, therefore, I have always taken it that, although she is delivered before the next sessions, yet the sheriff ought not to make execution after her delivery; neither ought the judge to give such direction upon the reprieve granted, but at the next sessions the woman must again be called to shew what she can say why execution should not be made, and she is to be heard." Besides, the rule established by the decision of Holt, C.J., in *Duke's case*, 1 Salkeld, 400, that "judgment cannot be given against a man in his absence for corporal punishment" stands in the way, unless the statute has dispensed with the formality. Sec. 660 of the Code assumes, no doubt, to regulate this matter of the presence of a felon during his trial. Sub-s. 1 reads: "Every accused person shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable." Sub-s. 2: "The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper." This, even if the expression "trial" can be supposed to include sentence, which to say the least, is doubtful, could not furnish authority for exclusion by the court of a prisoner, not seeking it, arbitrarily, or ex mero motu. One hundred and fifty years later the principle embodied in *Duke's case* was re-affirmed by a particularly strong court (Campbell, C.J., Patteson, J., and Earle, J.) in *Rex v. Chichester*, 17 Q.B., 504—that, in turn being—no further back than 1870—approved by a trio as eminent, (Cockburn, C.J., Blackburn, J., and Hannen, J.) in *Reg. v. Williams*, 18 W.R. 806. The last utterances were formulated, notwithstanding the circumstances that non-appearance in both matters was deliberate, one prisoner having gone to sea, and the other having departed for America. The doctrine nullus commodum

capere protest de injuriâ suâ propriâ (No man can take advantage of his own wrong) was evidently not deemed invocable.

One accompaniment of the death penalty is that officer under whose direction it shall be executed is "that the officer in whose custody by law the prisoner is at the time of the judgment given, for into his custody he is to be remanded, and there to stay, till judgment executed." This may bring about a novel state of things. When there has been, as we find here, the escape of a prisoner, and his recapture should follow, the question of his identity with the individual against whom the verdict has been found and sentence pronounced would have to be formally tried. Sir Matthew Hale says: "Where the prisoner has not always remained in the custody of the court where he first had judgment, he shall not be concluded by the sheriff's return from saying that he is another person, and issue may be taken upon that, and that issue shall be tried before he shall have execution awarded against him."

Could it not be argued, with some show of reason, that since there must be an existing as well as a lawful judgment to sustain the plea of autrefois convict that a new trial of the prisoner, if he should be taken, is available. He, by his own act, might be said to have nullified the sentence, and could hardly suggest the barrier of "twice placed in peril."

Deplorable as it would be, from every point of view, were Cashel to succeed in cheating the gallows, by reason of any legal hindrance that has come into being, such outcome would hardly surpass what transpired in *Rex v. Fletcher*, 1 Russ. & Ry. 58, where a murderer, by force of an equal division of opinion amongst sixteen judges as to whether the court's not clapping dissection upon it, vitiated a sentence of hanging, bore off an undamaged spinal column.

J. B. MACKENZIE.

NEGLIGENCE OF RAILWAY COMPANIES IN CANADA.

The obligations of Railway Companies in carrying on their business in Canada and the duties which they owe to the public are to a considerable extent and perhaps altogether prescribed and defined by statute and now embodied in The Railway Act of 1903 passed by the Parliament of Canada at its last session. That Act, it is true, only professes to deal with railways under the control of the Dominion Parliament, but inasmuch as nearly all railways in Canada are subject to such control, and as, moreover, the Provincial Acts governing purely local roads contain provisions similar to those in the Federal statutes, the latter only need be referred to.

How far a Railway Company in this country is still governed by the principles embodied in the common law maxim, *sic utere tuo ut alienum non lædas*, and is also, as employing a dangerous agent, under the common law obligation of using more than ordinary care and caution in operating its line of railway, is not by any means clear. The decisions of our own Court of final resort in cases in which this question is involved are at variance with those decided by Provincial Courts and also with each other, and the Judicial Committee of the Privy Council has never been called upon to consider it.

As early as 1858 this matter came before an Ontario Court in *Campbell v. G.W.K. Co.*, 16 U.C.R. 498, and it was necessary to determine whether or not the defendant company, which had complied with all that the statute required for protection of cattle at farm crossings, were called upon to take further precautions to that end. Sir John Beverley Robinson, C.J., said in giving judgment: "The statute 14 & 15 Vict., c. 51, s. 13, sub-s. 1, affords a strong argument that the legislature, when they passed the Act, did not understand nor intend that the railway companies to which the provisions of that statute were to apply, were to be relieved from the necessity of making use of ordinary care to avoid injury to the animals of others which they might find upon their railway under circumstances implying that they were there by the fault of their owner. . . . It will be for the legislature to consider whether it would, on the whole, be better to place farm crossings on the same footing in this respect as public highways

which intersect the railway ; but until that has been done the principles and maxims of the common law must prevail in such cases as in others."

In 1886 the Court of Appeal referred to this case and affirmed the principle on which it was decided, *Hurd v. G.T.R. Co.*, 15 O.A.R. 58, though the company was held not liable as having taken all necessary precautions.

Spragge, C.J.O., says in *Rosenberger v. G.T.R. Co.*, 8 O.A.R. 488: "The duty of giving warning was a common law duty, and those who suffered injury by neglect of that duty had a common law right of action against the wrong-doers. The statute only defined how that duty should be performed and annexed a penalty, besides compensation, for its non performance in the way prescribed. It in no way abridged the duty ; its purport was to define it. There is not a word in it that points to an abridging of the common law right of those suffering injury through a neglect of duty, or taking away the right of any one who, at common law, was entitled to a remedy." This, it is true, was only *obiter*, as the case was decided on another ground, and the Chief Justice expressly stated that he only spoke for himself, but it presents the view of an able jurist with which, practically, all the Ontario judges have always been in accord.

In *McKay v. G.T.R. Co.*, 5 O.L.R. 313, the Court of Appeal acted on the same principle. This case will be referred to later.

In Nova Scotia the same view of this question seems to prevail : see *Smith v. C.P.R. Co.*, 34 N.S. Rep. 22. In New Brunswick also: *Fleming v. C.P.R. Co.*, 31 N.B. Rep. 318. And in Manitoba: *McMullan v. Man. & N.W. R. Co.*, 4 Man. L.R. 220.

The Supreme Court of British Columbia in *Madden v. Nelson & Fort Sheppard R. Co.*, 5 B.C. Rep. 541, held that the common law remained except where expressly altered by the statute.

Having considered the view taken by the Courts of the several Provinces on this question, it is now necessary to examine the decisions of the Supreme Court of Canada and ascertain if possible how the law stands by the adjudication of the court of final resort in this Dominion.

In the case of *New Brunswick R. Co. v. Vanwart*, 17 S.C.R. 35, Mr. Justice Patterson, in giving the judgment of the court, laid down a distinct rule of jurisprudence, namely, that where the

Railway Act provided for warning to be given in a certain way of the approach of a train to a highway crossing, such provision, though only declaratory of the common law, afforded a criterion of what could reasonably be required, and that no further obligation could be imposed on the company in this respect. This rule was applied, in the case before the court, so as to exempt the company from all liability for injuries caused by failure to give warning on approaching a siding used for the business of a lumber mill, it being customary for trains to stop there, and the servants of the company knowing that a number of people were generally present when they did stop.

The rule, then, in the *Vanwart* case, may be shortly stated as follows: As specified warnings are prescribed on approaching a highway crossing, no other precautions need be taken at such place and none at any other place. That is the rule as applied to the special matter in question in the case, but the decision has a much greater effect and establishes the very broad principle that as to anything affecting the business of a Railway Company dealt with by the Act the common law is entirely superseded.

As has been shown, this ruling is at variance with the views of other Canadian Courts which, of course, if it is still law, are overruled. It is also opposed to the general rules governing the construction of statutes. Maxwell says (3 ed. p. 113): "One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by implication. In all general matters beyond the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness."

And Hardcastle (3 ed. p. 197) says: "It is a rule as to the limitation of the meaning of general words used in a statute that they are to be, if possible, construed so as not to alter the common law." Both writers cite numerous cases to support their views.

But the Supreme Court has itself since refused to follow the *Vanwart* Case. In *Fleming v. C.P.R. Co.* cited above, the facts were these: At a crossing of the Intercolonial Railway on one of the main thoroughfares of St. John, N.B., gates had been erected, though not required by the statute, which were to be lowered when

a train was passing. At the time of the accident which occurred these gates could not be lowered owing to frost, and Fleming seeing them up thought he could safely cross, and in attempting to do so was struck by a passing train and hurt. The statutory warnings had been given and the speed of the train was only five miles an hour. The Supreme Court affirmed a verdict for Fleming in an action for damages holding that as it was known that the gates were liable to be frozen up, the company was bound to take other sufficient precautions to prevent injury to travellers on the highway.

An appeal from this judgment to the Supreme Court of Canada was quashed for want of jurisdiction (22 S.C.R. 33), but three of their Lordships, constituting the majority of the court, expressly stated that if they had been called upon to decide the merits of the appeal they would have affirmed the judgment below. The two dissenting judges, Gwynne and Patterson, JJ., consistently adhered to the view expressed by the latter (and concurred in by Judge Gwynne) in *Vanwart's case*, namely, that the company having done all that the statute required owed no further duty to the public. It may be mentioned also, that two of the majority of the court took part in the *Vanwart case*.

In his judgment in the Supreme Court of New Brunswick in this case, Mr. Justice King, with whose opinion the three judges on the appeal expressly agreed, said, p. 345: "There was no breach by the defendants of any statutory obligations, and if they are to be made liable at all it must be because, having regard to all the circumstances of the case, they omitted that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger."

It is clear from these remarks that the decision was not based on the ground that the public had come to rely on the use of the gates for protection, and when they could not be used it was the duty of the company to provide an efficient substitute, but that the ratio decidendi was that a common law duty had not been performed. After that decision, therefore, *New Brunswick R. Co. v. Vanwart* no longer expressed the law on this question.

But there is still another decision of the Supreme Court of Canada by which *C.P.R. Co. v. Fleming* is in its turn overruled. That is in the case of *G.T.R. Co. v. McKay*, judgment in which

was pronounced on December 1st, 1903, and is not yet reported. (See note of this case post p. 74.)

In this case the decision depended on the construction to be placed on s. 8 of 55 & 56 Vict., c. 27, which provides that in passing through a thickly peopled portion of a city, town or village, a railway train should not proceed at a greater rate of speed than six miles an hour unless the track was fenced in the manner prescribed by the Act. In s. 259 of the Railway Act of 1888 it was "unless the track is properly fenced." By another section of the latter Act the Railway Committee was given power to regulate the rate of speed in a city, town or village, but that it should not in any case exceed six miles an hour, "unless the track is properly fenced."

The only provision as to fencing, except that as to fences on both sides of the road, is contained in 55 & 56 Vict., c. 27, s. 6, which is substituted for and repeals s. 197 of the Railway Act, 1888, and is as follows: "At every public crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle-guards so as to allow of the safe passage of trains." This section is plainly intended to keep cattle off railway tracks and not at all to protect persons using the highway, which is left entirely open, from danger by passing trains.

In the case of *G.T.R. Co. v. McKay* the train was approaching a crossing on Main Street, a thickly peopled portion of the town of Forest, at the rate of at least twenty miles an hour, and McKay attempting to drive across the track it struck the carriage and threw him and his wife out, the latter being killed and himself injured. In an action against the Railway Co., the jury found that it was negligent in going at too great speed and not having gates at the crossing. The Court of Appeal affirmed a verdict for the plaintiff but its judgment was reversed by the Supreme Court which held that the company had complied with all the requirements of 55 & 56 Vict., c. 27, s. 6, as to fencing, and was not, therefore, obliged to reduce the speed of its train to the maximum rate prescribed by s. 8, and owed no further duty to the public.

A perusal of the written opinions of the judges in this case will show that it not only overrules the *Fleming case* but goes much further than *N.B.R. Co. v. Vanwart* in upholding the statute as

against the common law. In fact Mr. Justice Sedgewick expressly declares as his view that the Railway Act contains the whole law respecting the management and operation of railways, and the opinion of Mr. Justice Davies, concurred in by the Chief Justice and Killam, J., is almost as explicit in the same direction.

It is not necessary for the purposes of the matter under consideration to analyze the opinions of these learned judges and see how they will stand the test of criticism. It is sufficient to say that as the latest decision of the Supreme Court, *G.T.R. Co. v. McKay* settles the law in Canada as to the duty of a Railway Co. in respect to highway crossings in thickly peopled districts, and so far as the opinions of four judges are concerned it appears to lay down the rule that the common law can no longer be invoked in any railway case.

Though this question has never come directly before the Judicial Committee of the Privy Council it has been incidentally referred to in two or three cases, and the remarks of their Lordships on the subject may be usefully quoted as indicating a view not entirely in accord with that of the Supreme Court in *McKay's case*.

In *C.P.R. Co. v. Roy* (1902), A.C. 231, the Courts in Quebec had held that their Civil Code made the railway companies liable for damages by fire even without negligence. In reversing this the Lord Chancellor said, in giving judgment for the committee: "The law of England, equally with the law of the Province, in question, affirms the maxim, *sic utere tuo ut alienum non lædas*, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words." And in *E. & S.A. Tel. Co. v. Cape Town Tramway Companies* [1902], A.C. 391, Lord Robertson says: "The question of common law is thus raised directly (as well as indirectly in the just construction of the statutory provisions.)" These observations are only quoted as indicating that the committee apparently did not consider all the prior law to be swept away by a Railway Act.

But the most significant indication of this view is found in the case of *Madden v. Nelson & Fort Sheppard R. Co.*, [1899], A.C. 629. In that case the Supreme Court of British Columbia had, after discussing the principles governing repeal of statutes and pointing out that the previous state of the law can only be altered

by express provision or necessary implication, decided that the section of the Railway Act of 1888 as to fencing the track, superseded the common law. In this the learned judge who gave the judgment fell into error, as the section referred to is admittedly aimed at keeping in the cattle of neighbouring land-owners, an obligation not imposed by the common law. The Judicial Committee did not deal with this question, but decided the case solely on the validity or otherwise of a Provincial Act as to railway fencing, and these remarks appear at the close of their Lordships' judgment: "The only further observation their Lordships have to make is that these propositions are sufficient to dispose of this case and that, so far as the judgment in the court below is concerned, they do not propose to adopt in all respects, or to agree with some of, the remarks made as to the state of the common law, and as to how the common law would have existed without this legislation. Although it is unnecessary to consider that point their Lordships are not to be taken as adopting the reasons given by the judges in the court below upon the common law."

Taken in connection with what was said in the other cases these observations do not appear to be in accord with the decision in *G.T.R. Co. v. KcKay*.

C. H. MASTERS.

Ottawa.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
 DECISIONS.

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**PRACTICE—COSTS—JURISDICTION—RELIEF CLAIMED AGAINST DEFENDANTS
 ALTERNATIVELY—RULES 126, 976—(ONT. RULES 185, 1130).**

In *Sanderson v. Blyth Theatre Co.* (1903) 2 K.B. 533, the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) affirmed the decision of Grantham, J., on a point of practice. Relief was claimed by the plaintiff against two defendants alternatively; he succeeded as to one and failed as to the other. Grantham, J., ordered the plaintiff to pay the successful defendants' costs, and add them to his own, which he ordered the unsuccessful defendant to pay. The appeal was simply on the point of jurisdiction as to whether the court could order a defendant to pay the costs of a co-defendant as to whom the action failed, the cause of action being on contract or for breach of warranty. The Court of Appeal held that there was jurisdiction to do this and it might be exercised in the way Grantham, J., had exercised it, or by directing the unsuccessful defendant to pay his co-defendant's costs without ordering them to be paid by the plaintiff. "The mode in which the Court of Chancery dealt with the costs of defendants to Chancery suits affords an analogy which in my opinion ought to guide the court on the present occasion," per Romer, L.J.

**TRADE UNION—CAUSE OF ACTION—INTERFERENCE WITH LEGAL RIGHT—
 CONSPIRACY—MALICIOUS INTENTION—"STOP DAY."**

Glamorgan Coal Co. v. South Wales Miners (1903) $\frac{1}{2}$ K.B. 545, is one of a class of actions which are becoming rather frequent in the furtherance of the efforts of employers to relieve themselves from injuries caused by the interference of trades unions with their workmen. In this case the injury complained of was that the miners employed in the plaintiff's collieries in breach of their contract abstained from working on certain days called "stop days." In so doing they acted under the direction of a trade union given by its executive council, the object being to limit the

mining of coal so as to keep up its price, upon which the amount of the miners' wages depended. Bigham, J., (1903) 1 K.B. 118 (see ante p. 192) on the evidence found that the defendants had only bona fide given advice to the men at their request as to the course best to be pursued in their own interests and without any malicious intention of injuring the plaintiff, and with this finding Williams, L.J., agreed, but the majority of the Court of Appeal (Romer, and Stirling, L.J.J.) considered the case to be governed by the decision of the House of Lords in *Quinn v. Leatham* (1901) A.C. 495, and that the defendants had interfered and induced the workmen to break their contracts, and had failed to shew any sufficient justification for so doing.

COMPANY—INDEMNITY—FORGED TRANSFER OF STOCK—INNOCENT PRESENTMENT OF FORGED TRANSFER FOR REGISTRATION—IMPLIED CONTRACT TO INDEMNIFY.

In *Sheffield v. Barclay* (1903) 2 K.B. 580, the Court of Appeal (Williams, Romer, and Stirling, L.J.J.) have failed to agree with the judgment of Lord Alverstone, C.J. (1903) 1 K.B. 1 (see ante p. 186). The plaintiff corporation had transferred certain stock to the defendants on the faith of a forged transfer thereof, which the defendants in good faith believing it to be genuine, presented to them, and issued to the defendants a certificate that they were the owners thereof. The plaintiff corporation claimed that the defendants had impliedly guaranteed the genuineness of the transfer, and were bound to indemnify the plaintiffs, they having been compelled to replace the stock at the instance of the true owner. The Court of Appeal, however, came to the conclusion that as the transfer to the defendants was registered, and a certificate issued to the defendants in pursuance of the plaintiffs' statutory duty, and not voluntarily by reason of the request of the defendants, there was no implied contract by the defendants to indemnify the plaintiffs against the loss which they had sustained. This may be good law, but it seems to be poor justice. As between two innocent persons, the one who is the immediate victim of a fraud should be the one to suffer, and he ought not to be able to pass on to others the loss which he himself ought to sustain. In this case if the fraud had at once been discovered the defendants would have been the losers, but because they got the plaintiffs to act on the fraudulent document the plaintiffs have to bear the loss. In short, in an ideal system of law, frauds ought not to be negotiable.

RESTRICTIVE CONDITION—COVENANT RUNNING WITH LAND—PERSONAL AND COLLATERAL COVENANT—BREACH OF CONDITION AFTER DEATH OF GRANTOR—RIGHT OF ACTION—ASSIGNS OF ESTATE SOLD SUBJECT TO RESTRICTIVE CONDITION.

In *Formby v. Barker* (1903) 2 Ch. 539, the plaintiff was executor and sole devisee of a vendor who had sold an estate of which he retained no part. In the conveyance was contained a covenant against erecting any beerhouse or shop or hotel of less annual value than £50. The vendees did not execute the deed. It was consequently held that there was in fact no covenant, but what purported to be a covenant was in fact a condition. The vendees sold the land and the defendants by virtue of certain mesne conveyances became the owners, and were proceeding to erect a building in alleged breach of the condition. Before this alleged breach the vendor had died, and the present action by his real and personal representative was brought to restrain the alleged breach. Hall, V.C., who tried the action, dismissed it on two grounds, first because, as he found, there had been no breach, and second, because if there had been the plaintiff could not maintain an action in respect of a breach committed after the death of the vendor. The Court of Appeal (Williams, Romer, and Stirling, L.JJ.) agreed with him on both grounds. In the point of law involved on the second ground of his decision they held that the doctrine of *Tulk v. Moxhay*, 2 Ph. 774, did not apply because the vendor retained no land intended to be benefitted by the covenant or condition, that it was therefore merely personal and collateral. That even if there had been a legal covenant it would not run with the land so as to bind an assign of the vendee, nor would the benefit of it be transmissible to the real or personal representative of the vendor except as to breaches committed in his lifetime; therefore they held that an injunction was properly refused.

SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—GENERAL POWER OF APPOINTMENT.

In *re O'Connell, Mawle v. Jagoe* (1903) 2 Ch. 574, Kekewich, J., decided that property over which a married woman had during coverture acquired under a will a general power of appointment, and which in default of appointment was bequeathed to her absolutely, was property within the meaning of a covenant in her

marriage settlement binding her to settle after acquired property. *Ex p. Gilchrist*, (1886) 17 Q.B.D. 521, the Court of Appeal decided emphatically that a general power of appointment was not "property." In the present case, however, there is the circumstance of the gift over absolutely in default of appointment, which Kekewich, J., holds makes it "property" within the covenant; following *Steward v. Poppleton*, W.N. (1877) 29, notwithstanding *Townshend v. Harrowby*, (1858) 27 L.J. (Ch.) 553, to the contrary.

CROWN—JURA REGALIA—TREASURE TROVE - GRANT TO SUBJECT - FRANCHISES
—TITLE OF CROWN—JUS TERTII.

Attorney-General v. British Museum (1903) 2 Ch. 598, was a suit on behalf of the Crown to recover certain ancient Celtic ornaments found in Ireland and subsequently sold by the owner of the land on which they were found to the British Museum, the Crown claiming to be entitled thereto as treasure trove. The land on which the articles were found had been granted by the Crown with all such franchises as the Crown could grant to the predecessor in title of those who owned the land at the time the articles in question were found. The articles were found together in a space nine inches square about fifteen or eighteen inches beneath the surface of the soil. Farwell, J., found as a fact that they had been intentionally concealed for the purpose of security probably about a thousand years ago. The suggestion of the defendants that they were votive offerings to some sea god, he held was not sustained, and he also held that the articles were treasure trove, the right to which was a prerogative right, and as such part of the flowers of the Crown, and did not pass under the grant of franchises. Whether they would pass under the grant of royalties he declined to say, but as the only grant of royalties proved was those relating to the office of vice-admiral, he held that at all events treasure trove was no part of such royalties. Judgment was therefore given in favor of the Crown.

SOLICITOR—PARTNERSHIP—LIABILITY FOR ACTS OF CO-PARTNER - SCOPE OF PARTNERSHIP—SOLICITOR TRUSTEE—FRAUD.

Tendring Hundred Waterworks Co. v. Jones (1903) 2 Ch. 615, was an action in which the plaintiffs sought to make a partner of a solicitor, who was trustee for the plaintiffs, responsible for the trustee's breach of trust. The defaulter was secretary of the

plaintiff company, and the company for its own convenience had certain property which it had purchased conveyed to the secretary without any declaration of trust. The conveyance was prepared in the office of the firm of which the secretary was a member, and the deed was retained in the possession of the solicitor trustee, who subsequently fraudulently raised money thereon by deposit of the conveyance, and subsequently executed a legal mortgage of the property to the equitable mortgagee. The defendant had no actual notice of the conveyance, or of the fraud of his partner. The partnership deed made the secretaryship a part of the partnership business. It was held by Farwell, J., that as the trustee had a legal right to the possession of the deed, it was no part of the duty of the firm to see that he did not obtain it without the consent of the company, and even assuming that the firm would have been liable for any negligence of the solicitor as secretary, it was no part of his duty as secretary to act also as trustee. The defendant was therefore exonerated from liability for his partner's fraud.

COMPANY—WINDING UP—LIQUIDATOR—CREDITORS—ADVERTISEMENT FOR CREDITORS—NEGLIGENCE.

Pulsford v. Devenish (1903) 2 Ch. 625, was an action brought by creditors of a company, which had been voluntarily wound up, against the liquidator for neglecting to pay, or see that the assets were applied in payment of, the plaintiff's debt. The business and assets of the company had been transferred as a going concern to another company, the purchasers covenanting to pay all debts of the liquidating company. The liquidator received fully paid-up shares in the purchasing company as the consideration of the sale, and distributed them among the shareholders of the liquidating company. The assets of the liquidating company were sufficient to pay all its debts in full, but the liquidator beyond advertising for creditors (insufficiently as the Court found) took no steps to ascertain the debts or to see that they were paid, but left everything to the purchasing company. He knew of the existence of the plaintiff's claim, but the plaintiff had no notice of the liquidation until after the dissolution of the liquidating company. Under these circumstances Farwell, J., held that the liquidator had been guilty of negligence and was liable for the amount of the plaintiff's claim.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.]

[Nov. 16, 1903.]

CAN. MUTUAL RESERVE FUND LIFE ASS. *v.* DILLON.*Appeal—New trial—Alternative relief.*

In an action on a policy of insurance on the life of plaintiff's husband, the defence being misrepresentation and concealment of material facts, plaintiff obtained a verdict though defendant's counsel claimed that there was no case to go to the jury. On appeal to the Court of Appeal, claiming judgment for defendants or in the alternative a new trial, such alternative relief was granted (5 O.L.R. 434). The defendants then appealed to the Supreme Court to obtain the larger relief.

Held, that the appeal did not lie; that it was not an appeal from the order for a new trial, and that the judgment refusing to enter a dismissal of the action was not final. Appeal quashed without costs.

Lucas and Wright, for motion to quash. *Aylesworth*, K.C., contra.

Ont.]

CANADIAN MUTUAL LOAN CO. *v.* LEE. [Nov. 19, 1903.]*Appeal—Amount in dispute—Title to land—Future rights.*

L. had given a mortgage to The Standard Loan and Savings Co. as security for a loan and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the Canadian Mutual Loan Co., and L. paid the latter the amount borrowed with interest and \$460.80 in addition and asked to have the mortgage discharged. The company refused, claiming that L. as a shareholder in the Standard Co. was liable for its debts and demanding \$79.20 therefor by way of counterclaim. At the trial of an action by L. for a declaration that the mortgage was paid and for repayment of the said \$460.80, such action was dismissed (1 O.L.R. 191), but on appeal the Court of Appeal ordered judgment to be entered for L. for \$47.04 (5 O.L.R. 471). The defendants appealed to the Supreme Court.

Held, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of sub-s. (d) of 60 & 61 Vict., c. 34; and that all that was in

dispute was a sum of money less than \$1,000, and therefore not sufficient to give jurisdiction to the court. Appeal quashed with costs.

W. J. Clark, for motion. *Shepley*, K.C., and *Macdonell*, contra.

Ont.]

C.P.R. CO. v. BLAIN.

[Nov. 30, 1903.

Railway—Injury to passenger—Duty of conductor.

B., a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet B. did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor who took no action and a third assault having been made, B. left the train and completed his journey on the following day. In an action against the railway company B. obtained a verdict for \$3,500 which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court of Appeal (5 O.L.R. 334) that the company was liable; that it was the duty of the conductor on being informed of the first assault to take precautions to prevent a renewal, and his failure to do so gave B. a right of action.

Held, also, that as B. did not anticipate the second assault the conductor could not be assumed to have foreseen it and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to \$1,000 and a new trial had if this sum was not accepted. Appeal allowed without costs.

Johnston, K.C., and *Denison*, for appellants. *Riddell*, K.C., and *D. O. Cameron*, for respondent.

Ont.].

THOMPSON v. COULTER.

[Nov. 30, 1903.

Executors—Action by—Evidence—Corroboration—R.S.O. (1897) c. 73, s. 10.

In an action by executors to recover money due from C. to the testator it was proved that the latter when ill in a hospital had sold a farm to C. and \$1,000 of the purchase money was deposited in a bank to testator's credit; that subsequently C. withdrew this money on an order from testator who died some weeks after when none was found on his person nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to testator. No other evidence of any kind was given of such payment.

Held, reversing the judgment of the Court of Appeal that a *prima facie* case having been made out against C. and his evidence not having been

corroborated as required by R.S.O. 1897, c. 73, s. 10, the executors were entitled to judgment. Appeal allowed with costs.

F. E. Hodgins, K.C., for appellants. *Aylesworth*, K.C., for respondent.

Man.] MANITOBA & N.W. LAND CORP. v. DAVIDSON. [Nov. 30, 1903.

Principal and agent—Breach of duty—Secret profit.

D. represented to the manager of a land corporation that he could obtain a purchaser for a block of its land and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time, for which the purchaser agreed to pay \$500. The sale was carried out and D. sued for his commission, not having then received the \$500.

Held, reversing the judgment appealed from (14 Man. L.R. 233) that the consent of D. to accept the \$500 was a breach of his duty as agent for the corporation which disentitled him from recovering the commission. Appeal allowed with costs.

Aylesworth, K.C., for appellants. *G. A. Elliott*, for respondent.

Ont.] G.T.R. Co. v. MCKAY. [Dec. 1, 1903.

Railway—Speed of train—Crowded districts—Fencing—Negligence—50 & 51 Vict., c. 29, ss. 197, 259 (D)—55 & 56 Vict., c. 27, ss. 6, 8 (D).

By s. 259 of Railway Act, 1888, as amended by 55 & 56 Vict., c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles an hour unless the track is fenced in the manner prescribed by this Act." Besides the usual railway fences the only fencing required is that provided for by 55 & 56 Vict., c. 27, s. 6, which is substituted for s. 197 of The Railway Act, 1888, namely, "At every public road crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned into the cattle guards, so as to allow of the safe passage of trains." The plaintiff, McKay, was injured and his wife was killed by a train passing through a thickly peopled portion of the town of Forest at a speed of at least twenty miles an hour and on the trial the jury found that such speed was excessive for that place and constituted negligence on the part of the company.

Held, reversing the judgment of the Court of Appeal (5 O.L.R. 313), GIROUARD, J., dissenting, that the company, having complied with the statutory provisions as to fencing, were not liable. Appeal allowed with costs.

Riddell, K.C., and *Rose*, for appellants. *Hellmuth*, K.C., and *Hanna*, for respondent.

N.S.]

DICKIE v. CAMPBELL.

[Dec. 4, 1903.

Rivers and streams—Floating logs—Damage to riparian owners.

The Nova Scotia statute R.S.N.S. (1900) c. 95, s. 17, gives to persons engaged in the transmission of saw logs and timber down rivers and streams the reasonable use of and access to the same for their business and relieves them for liability from any but actual damage thereby, unless caused by their own wilful act.

Held, affirming the judgment appealed from (36 N.S. Rep. 40) that such persons are liable for all actual damage caused in transmitting logs, even without negligence, and the owner of the logs is not relieved from liability though they were transmitted by other persons under contract with him.

On motion for a new trial one of the grounds was misdirection in the charge to the jury. The trial judge reported to the full court that he did not make the direction on which this objection to his charge was based and gave a correct report of what he said.

Held, that this was not an objectionable course for the judge to pursue and in any case it was a matter for the court appealed from whose ruling was not subject to review. Appeal dismissed with costs.

Harris, K.C., for appellant. *W. B. A. Ritchie*, K.C., for respondents.

Yukon Terr.]

CREESE v. FLEISCHMAN.

[Dec. 9, 1903.

Appeal—Discretion—Amendment—Formal judgment.

The Supreme Court would not interfere with the exercise of discretion by a provincial court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case where the mining regulations operate to give the judgment the same effect as it would have if amended. Appeal dismissed without costs.

J. Travers Lewis, for appellants. *Russell*, K.C., and *Haydon*, for respondents.

EXCHEQUER COURT OF CANADA.

Burbidge, J.]

[Nov. 23, 1903.

IN RE GRAND TRUNK R.W. CO.; THE CITY OF KINGSTON; THE COUNTY OF FRONTENAC; AND THE KINGSTON AND STORRINGTON ROAD CO.

Railway Committee of Privy Council—Construction of subway—Country road and city street—Cost of construction—Ultra vires—Merits of order.

The Municipal Corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a sub-way under a railway, by which one of

the city streets was made to connect with a country road, the works being adjacent to a city street but not within the city limits.

Held. 1. The city was interested within the meaning of the term as used in the 188th section of the Railway Act, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company "and any person interested therein."

2. On an application to make an order of the Railway Committee of the Privy Council a rule of Court, the Courts will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.

Semble, that while the Railway Committee of the Privy Council has jurisdiction in such a case, to impose upon the party interested an obligation to bear part of the expenses, it has no jurisdiction to compel a party other than the railway company to execute the works.

Orders made a rule of Court.

J. McD. Mowat and Glyn Osler for the motion. D. M. McIntyre contra.

Burbidge, J.]

VROOM *v.* THE KING.

[Dec. 7, 1903.

Petition of right—Damage to lands—Subsidence—Release of claim—Liability.

In connection with the work of affording terminal facilities for the Intercolonial Railway at the port of St. John, N. B., the Dominion Government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from the expropriation by Her Majesty of the "lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature". One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair.

Held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and as the injury complained of happened principally because the suppliant had failed to repair his wharf the Crown was not liable therefor.

W. Pagsley, K.C., for suppliant. McAlpine, for the respondent.

Burbidge, J.] JOHNSTON v. THE KING. [Dec. 7, 1903
Contract—Bailment—Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Demise of Crown—50 & 51 Vict. c. 16, sec. 16 (c).

When the suppliant's goods were in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation for the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case the Crown is liable under the contract of its officer or servant.

The suppliant entered into a contract with the Crown, through an officer of the Department of Public Works, to supply certain pack-horses, with aparejos and saddles, for the purpose of construction of the Atlin-Quesnelle Telegraph line, at the sum of \$2.00 per horse for each day the animals were so employed. It was not practicable, as the suppliant knew, at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them from starving to death. It appeared that the aparejos and saddles were not returned to the suppliant. There was a time during construction when the horses could have been taken back alive, and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of the construction were sufficiently urgent to justify him in sacrificing the horses to the work.

Held. 1. Having regard to the circumstances, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.

2. Wherever there is a breach of a contract binding on the Crown a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor & Annapolis R.W. Co. v. The Queen*, 11 A.C. 607 referred to.

3. The Crown is liable in respect of an obligation arising upon a contract implied by the law. *The Queen v. Henderson*, 28 S.C.R. 425 referred to.

4. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown.

Semble. The loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause C of s. 16 of Exchequer Court Act.

A. E. McPhillips, K.C., for suppliant. *Howay* for respondent.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] IN RE NORTH YORK PROVINCIAL ELECTION. [Dec. 28, 1903.
KENNEDY v. DAVIS.

Parliamentary elections—Controverted election petition—Examination of respondent for discovery—Inquiry into corrupt practices committed at former election—Scope of—Lengthy examination—Discretion—Adjournment—Continuation.

Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question.

Where a question was asked with reference to a discussion between the respondent and another person before the previous question, coupled with a statement that the discussion was alleged to have been renewed at the election in question ;

Held, that the question should be answered.

If an examination for discovery is not connected with discretion or becomes oppressive, the court is empowered to declare that it shall be closed.

Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it ;

Held, that the respondent must attend for further examination.

S. B. Woods, for petitioner. Aylesworth, K.C., for respondent.

HIGH COURT OF JUSTICE.

Cartwright, Master.] NOXON CO. v. COX. [Nov. 26, 1903.
Venue—Change of—Contract giving jurisdiction where plaintiffs' head office is.

In an action brought in the County Court of the county where the plaintiffs' head office was located, on an agreement, which contained a provision "that on default in payment, suit therefore may be entered, tried

and finally disposed of in the court where the head office of the Noxon Co. (Ltd.) is located," a motion to change the venue to another county was refused on the grounds that the word "court" is to be understood as meaning "the court having jurisdiction" mentioned in section 1 a of 3 Edw. VII. (o) and should be construed in reference to the contract in which it occurs; and that the parties had agreed that in case of litigation the suit should be carried on in the court, whether High Court, County Court or Division Court having jurisdiction in the locality where the head office was.

Quere. Whether stronger grounds must be shewn on motion to change a venue in a County Court than a High Court action.

Proudfoot, K.C., for motion. *C. A. Moss*, contra.

Cartwright, Master.] FITZGERALD v. WALLACE. [Nov. 26, 1903.
Security for costs—Increased—Appeal to Court of Appeal—Where application for to be made—Con. Rules 826, 827, 830.

Applications for increased security for costs on an appeal from the High Court should not be made in the High Court, but must be made to the Court of Appeal or a judge thereof. *Centaur Cycle Co. v. Hill* (No. 2) (1902) 4 O.L.R. 493, referred to and followed.

Saunders, for motion. *Harcourt*, for infant defendants. *Rose*, for plaintiffs.

Cartwright, Master.] [Nov. 26, 1903.
FLYNN v. INDUSTRIAL EXHIBITION ASSOCIATION.

Pleading—Action for damages caused by machine—Striking out allegation in statement of claim of insurance by defendants against.

In an action for damages caused by a machine alleged to have been defectively constructed belonging to the defendants the fact that the defendants were insured in an insurance company against such accidents, cannot be given in evidence as is not in any way relevant; and a pleading alleging the fact of such insurance was struck out as embarrassing to the defendants.

G. L. Smith, for motion. *W. N. Ferguson*, contra.

Cartwright, Master.] HUNTER v. BOYD. [Nov. 28, 1903.

Amendment of pleadings after new trial ordered—Alleging special damages.

All necessary amendments may be made at any time and an action in which a non-suit has been set aside as against one defendant and a new trial ordered as to him by a Divisional Court is in the same position as if it was at issue and had not been tried; and the plaintiff may be allowed to

amend the statement of claim by inserting a paragraph claiming special damages. *The Duke of Buccleuch* (1892) P.D. 201 cited and referred to.

Semble, that while it may be convenient to submit a draft amendment it is not necessary so to do.

Wadsworth, for motion. *Riddell*, K.C., contra.

Cartwright, Master.]

[Nov. 28, 1903.

CANADIAN GENERAL ELECTRIC CO. v. TAGONA WATER & LIGHT CO.

Motion for judgment under rule 603—Goods sold and delivered—Amount admitted—Defence—Company's indebtedness exceeding statutory limit—Directors' liability—Triable issue.

In action against a company incorporated under R.S.O. 1897, c. 199, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by ss. 11, 40 of that Act and that the directors were personally liable and not the company, a motion for summary judgment was dismissed. *Jacob's v. Booth's Distillery Co.* (1901) 85 L.T.R. 262 followed.

Long, for motion. *Bain*, contra.

Cartwright, Master].

WILLIAMS v. HARRISON.

[Dec. 2, 1903.

Writ of summons—Renewal—Statute of limitations—Ex parte order—Master in Chambers—Local judge.

The Master in Chambers has jurisdiction to rescind an order made on the ex parte application of the plaintiff by a local judge for the renewal of a writ of summons if material evidence has, even unintentionally, been withheld.

Such an order was rescinded where on the ex parte application the facts that the writ had expired and that the Statute of limitations had run as against the claim were not brought to the notice of the local judge.

T. P. Galt, for application. *C. A. Moss*, for plaintiff.

Cartwright, Master].

APPLETON v. FULLER.

[Dec. 7, 1903.

Parties—Joinder—Several torts.

Claim against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the

same period as its agent, the plaintiffs, were ordered to elect as against which defendant they would proceed and the action was dismissed with costs as against the other.

J. B. O'Brian, for defendants. *S. Casey Wood*, for plaintiffs.

Boyd, C.]

IN RE WAGNER.

[Dec. 8, 1903.

Distribution of estates—Devolution of estates Act—Relations of the half-blood.

In the distribution under the Devolution of estates Act of the real and personal estate of an intestate, brothers and sisters of the half-blood share equally with those of the whole blood.

W. S. McBrayne, *H. E. Rose*, *Armour*, K.C., and *Aylesworth*, K.C., for the various parties.

Osler, J.A.] CENTRE BRUCE PROVINCIAL ELECTION. [Dec. 9, 1903.

STEWART v. CLARK.

Election petition—Fixing time for trial—Rota judges' obligation—Application by petitioner—Extending time.

While there is nothing to prevent a petitioner from making an application to fix the time and place of trial he cannot be said to be in default for not having done so. The obligation and initiation in that respect are cast upon the Rota Judges, the only penalty (if so called) upon the petitioner being that if three months lapse after the presentation of the petition until the day for the trial being fixed any elector may on application be substituted for the petitioner on proper terms. And in such cases as when the judges' other engagements are such as to make it difficult for them to try the petition an application to extend the time for proceeding to trial will be granted almost as a matter of course.

R. A. Grant, for petitioner.

Cartwright, Master,]

PHERRIL v. PHERRIL

[Dec. 10, 1903.

Alimony—Interim—Inability of defendant to pay—Order refused.

An order for interim alimony, will not be made against a defendant where it is not shewn that he has the means to comply with such an order if made.

Godfrey, for the motion. *McNab*, contra.

Cartwright, Master] RE TRAVELLERS INSURANCE CO. [Dec. 15, 1903.
KELLY v. McBRIDE.

*Insurance—Life—Policy payable to mother—Surrender—New policy issued.
Disposition varied—Sister if she survived mother—Claim by executors
of assured—Sister entitled.*

In 1888 the deceased was insured in the Travellers' Ins. Co., for \$1,000, payable at his death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of \$148.62 and a paid up policy for \$500. payable at his death. In the latter policy it was provided that "the sum insured is to be paid to (mother), or in the event of her prior death to (a sister) or if the insured shall survive the aforesaid beneficiaries to his legal representatives or assigns". The mother died in 1901, and the assured died in 1903.

Held, that the sister, who had supported the mother, for the last four years of her life at the request of the assured, was entitled to the insurance money as against the executors of the latter.

Loftus, for the executors. *James Bicknell*, K.C., for the sister.

Meredith, C.J., MacMahon, J., Teetzel, J.] [Dec. 17, 1903.

LINTNER v. LINTNER.

*Detinue—Demand and refusal after action—Inference of conversion before
action—Husband and wife.*

The plaintiff left her husband, the defendant, on the 21st October, 1902, and shortly afterwards brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had been begun, she went to his house and demanded her property. He said, in effect, that he did not wish her to take her things away, because he was anxious that she should go back and live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit.

Held, that this did not shew such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue; as to which quære.

Semble, that, if the action had been for the conversion of the plaintiff's property, nothing was shewn from which the inference that there had been a conversion before action could properly be drawn.

Judgment of FALCONBRIDGE, C.J., reversed.

R. S. Robertson, for defendant. *Mabee*, K.C., for plaintiff.

Osler, J.A.] GIBSON v. LE TEMPS PUBLISHING Co. [Dec. 18, 1903.

Partnership—Foreign judgment against corporation—Action on, against partnership—Recovery of judgment—Estoppel—Service—Execution against partners—Rule 228—Issue.

A judgment was recovered by the plaintiff in a superior court of the Province of Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario," in an action for libel. There was no incorporated company in Ontario of that name, but a partnership firm of that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun in Ontario by a writ specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F.V.M., the manager of Le Temps Publishing Co., but without the notice in writing required by Rule 224, informing him in what capacity he was served. Le Temps Publishing Co. appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F.M. as "one of the registered partners of the defendants, otherwise called La Campagnie de Publication Le Temps." Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife as members of the defendant partnership, an issue was directed to be tried to determine whether they were members of the partnership and liable to have execution issued against them.

Held, that it must be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an impeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed.

W. H. Barry, for Sara Moffat. *D. J. McDougal*, for plaintiff.

Meredith, J.]

[Dec. 18, 1903.]

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of claim—Delivery after defence—Irregularity.

The defendants entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim.

Held, that a statement of claim subsequently delivered by the plaintiffs was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be amended without leave.

Rules 171, 243, 247, 256, 300, considered.

Middleton, for defendants. *C. P. Smith*, for plaintiffs.

Trial—Street, J.]

CROWDER v. SULLIVAN.

[Dec. 19, 1903.]

Promissory note—Illegal consideration—Contract in restraint of marriage—Insanity.

The only consideration for the making of a promissory note for \$1,500 by the defendant's intestate in favour of the plaintiff was an agreement on the plaintiff's part not to marry L. or any other man as long as the intestate should live. She was about 30 years old and was his cook and housekeeper; he was about 60 years of age and apparently in excellent health; but three months after he made the note he became insane and died a year later.

Held, that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it.

On the evidence, the issue raised as to the capacity of the deceased at the time the note was made was found in favour of the plaintiff.

D. B. MacLennan, K.C., and *C. H. Cline*, for plaintiff. *J. Leitch*, K.C., and *W. B. Lawson*, for defendant.

Osler, J.A.]

IN RE DELLER.

[Dec. 24, 1903]

Will—Construction—Devise—Absolute gift—Conditional gift over—Validity—Disposition of corpus—Income—Executor.

A testator by his will bequeathed a small sum for a religious object, and proceeded: "my wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall

be equally divided between my five children. The estate consisted of realty.

Held, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise by the course of law.

Flintoft, for executor. *Frank Denton*, K.C., for widow. *Geary*, for children.

Meredith, J.,]

IN RE ADAMS.

[Dec. 28, 1903.

Distribution of estates—Devolution of Estates Act—Next of kin—Collateral relations—Per capita distribution—Half-blood—Double blood.

An intestate was possessed of both real and personal property, and left no wife, child, father, brother, uncle, or aunt.

His next of kin were cousins, more of whom were the children of his father's half brother, and one of whom was the neice both of his father and mother.

Held, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation; those of the half-blood take equally with those of the whole blood and those of the double blood take no more.

Farewell, K.C., *Armour*, K.C., *G.C. Campbell*, and *George Bell* for the various parties.

Meredith, C.J.C.P.]

SLEMIN v. SLEMIN.

[Dec. 29, 1903.

Receiver—Interim alimony—"Creditor"—Police Benefit Fund—Pension.

The plaintiff, the wife of a retired member of the Toronto Police Force, and who was entitled to certain interim alimony under an order theretofore made, now applied to be appointed receiver of moneys to which the defendant, her husband, would become entitled as pension, under the rules of the Police Benefit Fund, (a Friendly Society incorporated under R.S.O. 1897, c. 211,) on application by him before the Benefit Fund committee, which application however, he had not yet made.

Held, that the plaintiff was not entitled to succeed, for whereas arrears of pension constitute a debt which may be attached by garnishee proceed-

ings, unearned pension cannot be reached either by that procedure, or by the appointment of a receiver.

Semble, that the plaintiff was a "creditor" within the meaning of s. 12, of the Police Benefit Fund Act, and on that ground also, her application must fail.

O'Neal, for plaintiff. *Godfrey*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court] *LE ROI MINING CO. v. NORTHPORT SMELTING CO.* [June 22, 1903.]

Smelting contract—Sampling ores—Automatic or hand sampling—Mine owner's representative at smelter—Authority of—Ores improperly sampled—Method of estimating values of.

Appeal from judgment of HUNTER, C.J., awarding the plaintiffs judgment for \$3974.70 and costs.

A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:—

Held, per HUNTER, C.J., and WALKEM, J., that the contract was entered into on the footing that the sampling was to be done automatically.

Per DRAKE and IRVING, JJ.: The contract permitted any mode of sampling so long as it was done properly and the true value of the ore was arrived at.

A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract.

Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute.

Amount of judgment reduced to \$2,550.58.

C. R. Hamilton, for appellant. *J. A. Macdonald*, for respondent.

Full Court] MARSHALL v. CATES. [Nov. 10, 1903.
Master and servant—Negligence—Verdict—Inconsistent answers—Construction of.

Appeal from judgment of MARTIN, J., in favour of the plaintiff in an action for damages for personal injuries received by the plaintiff while in the employ of the defendant.

In construing a jury's verdict, consisting of a number of questions and answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial.

In an action for damages for personal injuries from an accident happening because of plaintiff's failure to withdraw himself from danger in response to a signal the jury found that the defendant was negligent and that the signal was given prematurely and that the plaintiff should have heard the signal but being busy may not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for plaintiff.

Held, that the judgment must be affirmed.

E.P. Davis, K.C., for appellant. *J.A. Russell*, for respondent.

Full Court] HOOPER v. DUNSMUIR. [Nov. 17, 1903.
Practice—Undue influence—Particulars.

Appeal from an order of DRAKE, J. whereby the plaintiff was ordered to give particulars of undue influence alleged to have been exercised by defendant in obtaining a signature to a certain agreement.

Held, dismissing the appeal, that a party alleging undue influence will be required to give particulars of the acts thereof, the practice in this respect differing from that in the Probate division in England. *Lord Salisbury v. Nugent* (1883) 9 P.D., 23, considered.

Bodwell, K.C. for the appeal. *Davis*, K.C. and *Luxton*, contra.

Book Reviews

Canadian Railway Cases. A selection of cases affecting Railways recently decided by the Judicial Committee of the Privy Council, the Supreme Court and the Exchequer Court of Canada, and the Courts of the Provinces of Canada, with Notes and Comments, by Angus MacMurchy and Shirley Denison, Barristers-at-law, Vol. II. Toronto: Canada Law Book Company. Half-calf \$7.50.

The authors of this work have in the second volume of the series made

an excellent selection of railway cases which they have supplemented with useful notes. The volume includes a number of unreported decisions, while other cases are drawn from reports not readily accessible. It may be safely said that cases of the class dwelt with in this series have with the rapid growth of steam and electric railways come to form almost the most important of our legal reports. The series will be found a great assistance not only to the railway corporation lawyer but to the general practitioner. The first part of Volume III is now ready.

Parliamentary Procedure and Practice in the Dominion of Canada with Historical Introduction and an Appendix: by Sir John George Bourinot, K.C.M.G., late Clerk of the House of Commons of Canada: Third Edition, edited by Thomas Bernard Flint, M.A., L.L.B., D.C.L., of the Nova Scotia Bar, Clerk of the House of Commons. Toronto: Canada Law Book Company. Half-calf, \$9.00.

The third edition of this well known treatise upon which Sir John Bourinot was engaged at the time of his lamented death has been most judiciously completed and brought down to date by his successor the present Clerk of the House of Commons. The work is not merely the Canadians parliamentarian's vade mecum but is of the great importance and interest to every student of Canada's political institutions. It may be added that the printing and binding are of the best style and reflect great credit on the publishers of this edition.

UNITED STATES DECISIONS.

RAILWAY.—A passenger going upon a railroad train, is held, in *Kansas City, Ft. Scott & M. R. Co. v. Little* (Kan.) 61 L.R.A. 122, to have a right to rely upon the representations of a local ticket agent that such train will stop at a certain point to which he has purchased a ticket and desires to ride; and the company is held to be liable if he is compelled to leave the train before reaching his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station.

MUNICIPAL LAW.—A statute which requires municipal corporations to pay more for common labour employed on public improvements than it is worth in the market is held, in *Street v. Varney Electrical Supply Co.* (Ind.) 61 L.R.A. 154, to unconstitutionality deprive the taxpayers of their privileges and immunities, and of their property without due process of law, to interfere with their right of contract, and to be invalid as class legislation.

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The Hon. Henry George Carroll, Solicitor-General for the Dominion, has accepted the appointment of Judge of the Superior Court of the Province of Quebec for the District of Gaspé, in the place of Judge de Billy, retired. He filled the office of Solicitor-General with much acceptance, but, preferring law to politics, will doubtless be happier in his new position. He is succeeded by Mr. Rodolphe Lemieux, K.C.

We are glad to know that Mr. Benjamin Russell, K.C., D.C.L., is to be the new Chief Justice of the Province of Nova Scotia. No better appointment could be made. His high personal character as well as his legal acquirements would adorn the Bench. It is only by the appointment of such men as Dr. Russell that the high standing of the judiciary can be maintained. Congratulations may well be extended not only to the recipient of the honor but to the government for making so excellent a selection. Mr. D. C. Fraser, K.C., will become puisne judge in the place of Mr. Justice Henry resigned on account of ill health.

Henry William Newlands, of the City of Dawson, Yukon Territory, K.C., has been appointed puisne judge of the Supreme Court of the North-West Territories, in the room of Hon. Hugh Richardson, resigned. Although Mr. Newlands has not of late years been in active practice, he has had large experience in real property law in connection with his position under the Land Titles Act and has a judicial mind. His appointment meets with the general approval of the Bar over which he will now preside.

One of the provisions of the United States Immigration Law (passed in March, 1903,) is as follows: "No person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or officers generally, of the Government of the United States or any other organized government, because of his or their character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof." This enactment was placed upon the statute book as the result of public indignation over the assassination of President McKinley by the anarchist Czolgoz. In view of the motly herd of lawless cranks and moral degenerates from the slums of Europe that the tide of immigration has been pouring upon the shores of the United States during the past decade or so, we think this an excellent law. Not so, however, thinks anarchist John Turner, who hails from England, and who, during his incarceration in the immigrant detention cells on Ellis Island, N.Y., several weeks ago, pending deportation to the place whence he came, wrote for one of the New York journals a doleful article in dispraise of reactionary legislation of this kind in the new world. He melodramatically says: "I am locked in a cage 9 x 6 feet, strong enough to hold an elephant, and am guarded night and day." "Such treatment," he adds, "is the beginning of a new political tyranny in which America, with its democratic institutions, can give points to monarchical Europe." If this experiment does anything to suppress the propagation of doctrines which moved the unbalanced mind of Czolgoz to murder William McKinley, then we rejoice in anarchist Turner's vicarious sufferings. Socialism of the dangerous European sort is already rearing its unlovely front in the western part of this Dominion. It attempted bodily harm to one of our best known public men some two or three months ago. Some such modification of the present easy access of the avowedly lawless brotherhoods to Canada may be necessary in the near future.

WHAT IS THE COMMON LAW?

Answering Professor Burdick's contention that for several centuries prior to the time of Lord Coke "there was a true body of law in England which was known as the Law Merchant," (a) I pointed out (b) that he himself had stated that in Coke's time

"The Law Merchant was proved, as foreign law now is. It was a question of *fact* (c). Merchants spoke to the existence of their customs, as foreign lawyers speak to the existence of laws abroad. When so proved a custom was part of the law of the land. This condition of things existed for about a century and a half, prior to the time of Mansfield."

And I asked if there was ever "a true body of law in England or elsewhere, the existence of which had to be *proved*; law which the *judges* had never heard of; law which "was part of the law" only *after evidence to that effect* had been adduced? In a short commenting note the professor said, "I do not see that it calls for a serious reply."

I pointed out, too, that during the 150 years between Coke and Mansfield (during which, as the professor contends, the term law merchant "loses much of the definiteness which characterized it" prior to that period) so little progress was made in the development of "a true body of (merchant) law" that Buller, J., (Mansfield's colleague) declared that

"Before Lord Mansfield's time we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle" (d), and that Professor Burdick himself quoted Scrutton to the same effect:—

As a result little was done towards building up any system of mercantile law in England."

The question presents itself, therefore, in this fashion: Prior to Coke "there was a true body of law in England which was known as the Law Merchant"; after a further century and a half

(a) Prof. Burdick of Columbia University, New York, a lecturer and writer upon the law of Bills and Notes, challenged some sentences in the present writer's book upon Estoppel, wherein was questioned the existence of "a law of merchants in any other sense than there is a law of financiers or a law of tailors. . . . Judge-made law (not merchant-made), with Lord Mansfield as chief builder, is what we have here." The Professor's article was published in 2 Columbia Law Rev. 470.

(b) 3 Col. L.R., 135.

(c) All italics are those of the present writer.

(d) *Lickbarrow v. Mason* (1787) 2 T.R. 63.

it may truthfully be said that little had been "done towards building up *any* system of mercantile law in England," and that "*no* established principle" had been produced; *quære*, who had stolen that "true body" and where was it? To all this the professor said, "I do not see that it calls for a serious reply."

I also pointed out that at the end of the 150 years Lord Mansfield set to work to develop a body of rules for himself. Professor Burdick acknowledges this. He says that Lord Mansfield

"Reared a special body of jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it The great study has been to find some general principle, not only to rule the particular case under consideration, but serve as a guide for the future. . . . It was from such sources, and from the current usages of merchants, that he undertook to develop a body of legal rules which should be free from the technicality of the common law, and whose principles shall be so broad, and sound, and just as to commend themselves to all courts in all countries."

And I ventured to ask: Why all this bother? That "true body of law" which had existed in England "for several centuries" prior to Coke's time must have been discoverable somewhere and somehow. Why did not Mansfield hunt it up? Why not issue a "general warrant," if need be, for its production? Thousands of people knew it by heart, and had been swearing to it, hoping for generations to get the judges enlightened upon the subject. Why not call another witness? History does not tell us that anybody had stolen all of them, too. Why did Mansfield undertake "to develop a body of legal rules"? Was it because theretofore "no established principle" had been "produced"? If so, how could there have been, prior to Mansfield, "a true body of law in England which was known as the Law Merchant"? And the only answer is, "I do not see that it calls for a serious reply."

Endeavoring to sink the Law Merchant notion, I linked it with the "Common Law"—"the most impudent pretender of all these phantom laws" (*e*)—but perhaps I did not sufficiently prove that

(*e*) The Law of Nature; the Law of Nations; the Law of God; the Law of Reason; the Law of the Universe, &c.

the appendage was a sinker. The professor would suggest that it was a float. Was there then a true body of law in England which was known as the Common Law?

Names are largely unimportant, so long as the things signified are rigidly determined. If, for example, you chose to call judges' decisions the "Common Law," I shall not quarrel with you. For my part, I should much prefer to denominate such law "judicial legislation" (*f*), or "judiciary law" (*g*). But if you say that the Common Law was, or is, a true body of law, with existence *separate* from the decisions, or if you use the words indiscriminately, meaning, now, the decisions and, now, something else, definable or otherwise, I venture to disagree and to protest.

Let us have some one meaning. Have we three sets of laws—(1) the Common Law, (2) the decisions, and (3) the statutes? Or have we four sets—these three plus Equity? Or really five—(1) the Common Law (in nubibus), (2) Equity (in nubibus), (3) Common Law decisions, (4) Equity decisions, and (5) Statutes? Or only two—decisions and statutes?

For example, have we Equity law apart from Equity decisions? We have, no doubt, as Dr. Bryce tells us, a

"Regard for substantial as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of honour and conscience" (*h*).

or, as we might more shortly say, a regard for justice (for formal and technical justice is usually not justice, but injustice); but was there, or is there, "a true body" of Equity law anywhere but in the decisions?

Of course nobody ever thought that there was (*i*). Very well, now, where did the Common Law decisions come from? The Equity judges developed their system empirically, applying notions of justice to cases as they arose. What did the common law judges do? The answer is simple: Apart from Roman law and other written aids, these judges went to precisely the same source

(*f*) See Pomeroy's *Equity Jurisprudence*, p. 66; and Mr. Justice McClain's paper read before the American Bar Association, 1902.

(*g*) Bentham's phrase: *Principles of Moral and Legislation*, p. 8.

(*h*) *Studies in History and Jurisprudence*, 581.

(*i*) Mr. Pomeroy tells us that the early Chancellors were guided by "their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conception of *bona fides*": *Equity Jurisprudence*, 50.

as their Equity brethren ; they went to their notions of justice—until they took to following their own precedents, and then the Equity men came along and helped them out of the ruts they had themselves cut and swore they were bound to run in.

Distinguish between local customs and notions of justice. Customs have to be proved. They are not law until shewn to conform to the requisites of the legal conception of the custom.

“ Usage once recorded upon evidence immediately becomes written and fixed law ” (*j*).

There can be no law without a judicial sanction, and until a custom has been adopted as law by courts of justice, it is always uncertain whether it will be sustained by that sanction or not ” (*k*).

Commenting upon which Mr. Lightwood says (*l*) :—

“ We have thus arrived at the result that all law is, in the last resort, the creature of the sovereign, and that it is made immediately either by the sovereign or by a subordinate ; but that in the latter case it exists as law by the sovereign’s assent, either express or tacit, and it is made either by way of statute or *obliquely by way of judicial decision*. These are decided to be the only modes in which law can be made, and hence it does not exist by virtue of being customary, or of being in accordance with legal opinion, or with natural law. *These facts may be reasons for its adoption as positive law*, but it does not become such until the sovereign has adopted it in the manner above described, either individually or mediately, either directly or obliquely.”

Customs, then, we understand, and the best way to contrast them with our notions of justice is to say that it is by notions of justice that customs are accepted or rejected—are declared to be fit or unfit to become law. It is exactly at this point that Professor Burdick (if I may so say) goes wrong. He sees merchants plying their business according to fairly well understood but very general customs of very uncertain definition, and he imagines these customs or methods to have been laws—to have formed, indeed, “ a true body of law,” not observing that upon any difference of opinion arising between two of the merchants the courts had to determine which of the contentions was the more in accordance with their notions of justice, which was to be declared to be the law, and that in this way the courts

(*j*) Maine’s Village Communities, 72.

(*k*) Austin’s Lectures on Jurisprudence II, 565.

(*l*) The Nature of Positive Law, 359.

"have incorporated it (usage) in what is called the law merchant, and have made it part of the common law of the country" (*m*).

Is it not true that

"The proper idea of a rule of law (*n*) is that it is an attempt to sum up current opinion upon a class of cases?" (*o*).

an attempt (oftimes a poor effort) to sum up current opinion as to what is justice in relation to the class of case in hand.

"Law is declared, it is not made; it is a discovery, a statement of the conditions under which, as wise men have shewn, life can be lived" (*p*).

Customs, usages, notions there are, no doubt, in abundance prior to the decisions, but was there any law except "in crudest condition and regulative of simplest transactions" (*q*)—was there "a true body of law in England known as the Common Law," a body of law which not merely furnished enlightenment for the courts, but which, being a *true* body of law, was binding upon the courts? And was that "true body of law" something which the judges had never officially heard of, something which they had to ascertain as best they could from the mouths of contradictory witnesses?

There is a very short way of settling such questions. If any one says that there was or is "a true body of law known as Common Law" (apart from the decisions) let him quote for us, or otherwise authoritatively refer us to, a single item of it. The *Leges Barbarorum* we know; the laws of Justinian we know; the laws of the Twelve Tables (B.C. 500) we know; even the laws of Hammurabi of Babylon (B.C., say, 2250) we know, and can quote from. Will somebody please furnish us with an extract from the Common Law of England?

Surely this can easily be done. Go to the law reports and read to us. The judges, if they were deciding according to this "true body of law" will undoubtedly so indicate. No, these modern judges seem to know nothing of it. Open, then, these musty old Year Books; thumb them all. No? Try the Rolls—

(*m*) *Edelstein v. Schuler*, 1902; 2 K.B., 144.

(*n*) A judicial rule of law.

(*o*) Lightwood: *The Nature of Positive Law*, 226. And see the whole chapter—Ch. X.

(*p*) Jenks: *Law and Politics in the Middle Ages*, 301-2.

(*q*) 3 Col. L.R. 144; Note.

back as far as John's reign. Nothing there? Well, don't despair; in the works of Bracton (Chief Justiciar of England 1265-1267) or in those of Glanvil (the oldest writer on English jurisprudence, and Chief Justiciar of England in the reign of Henry II.) there must be some trace of this "true body." Not a word?

Well, where did these judges and writers get the law that they tell us of? Mr. Justice McClain would answer:—

"By ascertaining what it was customary for English judges to decide in like cases. The reading of Bracton, himself, beyond the introductory pages, proves conclusively the fact . . . He refers to decisions of the courts, although he is compelled to do so from current or personal knowledge, as reported decisions were as yet apparently unknown, and instead of announcing general principles, borrowed from any code, or pandects, or digests, he tells what was decided in an assize of mort d'ancestor, &c., . . . His successors were the digesters and abridgement-makers—Fitzherbert and Brooke and Rolle and Viner—and these men concerned themselves with the decisions of the English judges and prepared the way for Coke and Hale and Blackstone, the great expounders of the distinctively English system of law" (1).

If I am to be told that nobody says that anybody can give extracts from the common law, and that what is meant is that the Common Law consisted of certain well known principles upon which the decisions were based, then I ask profert of one of these principles. And if it be alleged that production is impossible, for that the said principles were in the mind or heart, or consciousness, or liver, or legs, of the people, and not otherwise or elsewhere, I still require at least a hint as to what they looked like before believing in their corporeality.

Perhaps they were mere ethical conceptions—conceptions supposed to be very clear and easily definable until somebody attempted to analyse and apply them. To you who have what you assume to be very certain and even rigid notions as to the compelling requirements of veracity, of justice, of purity, of benevolence, of the duty to act rationally, to govern the lower parts of your nature by the higher, and so on—to you, I say, read Professor Sidgwick's "Methods of Ethics," and perhaps you will arrive at his conclusion:—

(1) Address before the American Bar Association, 1902. The learned judge does not permit the Civil Law the influence which the present writer would attribute to it; but there can be little doubt that Bracton and Glanvil, whether they made much or little appeal to Roman Law, made none whatever to any "true body of law" known as the Common Law.

"We have examined the moral notions that present themselves with a *prima facie* claim to furnish independent self-evident rules of morality: and we have in each case found that from such regulation of conduct as the common sense of mankind really supports, no proposition can be elicited which, when fairly contemplated, even appears to have the characteristic of a scientific axiom"—although no doubt there may be "a rough general agreement, at least among educated persons of the same age and country" (*s*).

Yes, prior to the decisions there was "a rough general agreement" as to the principles which ought to regulate the relations and transactions of people "of the same age and country," but (with deference to Professor Burdick) I object to that "rough, general agreement" being called "a true body of law." I take the liberty of agreeing with one of the best of the American authors (Mr. Pomeroy) when (speaking of the appointment by William I. of a Chief Justiciar—"a permanent judicial officer . . . having supreme jurisdiction throughout England") he tells us that, prior to that period, law was administered by the Saxon local folk—courts having for officials no professional judges, and for laws a "mass of arbitrary rules and usages" (*t*). The new professional judges, with supreme jurisdiction throughout England, at once commenced the work of "reducing the tangle of customs to order" (*u*); commenced the construction of that

"Science which has for its ultimate aim the ascertainment of rules which shall regulate human regulations in accordance with the common sense of right" (*v*).

Let Mr. Pomeroy himself continue:

This "initial activity in creating the common law of England was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes" (*w*). "In this work of constructing a jurisprudence, the early common law judges, as well as the Chancellor at a later day, drew largely from their own knowledge of the Roman law. The evidence, both internal and historical, is conclusive that the common law of England, in its earliest formative period, was much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European Continent" (*x*).

(*s*) P. 360.

(*t*) Equity Jurisprudence, 13.

(*u*) Bryce: *Studies in History and Jurisprudence*, 763.

(*v*) Lightwood: *The Nature of Positive Law*, 36.

(*w*) Equity Jurisprudence, § 13.

(*x*) § 14.

Pause here for a moment—"the Common Law of England in its earliest formative period was much indebted to the Roman jurisprudence." In what sense are we using the words "the common law of England"? Do we mean "the arbitrary rules and usages" of the folk courts—the only things that look like laws before William's Chief Justiciar got to work? Or do we mean the "rough, general agreement" of the people? Or do we not mean that the judges got some light from the civil law? That the *decisions* were colored by Roman jurisprudence? The Common Law was much indebted to the Roman jurisprudence. If we mean by this the decisions, would it not be better to say so?

When Mr. Pomeroy speaks of "building upon the Common Law with materials taken from the never-failing quarries of the Roman legislation" (*y*), or declares that "the ancient Common Law rigidly exacted all penalties" (*z*), or indicates that "the ancient Common Law paid great deference to matters of pure form" (*a*), everybody understands him, and every lawyer (or nearly every lawyer) would use the words "Common Law" in the same sense. Turn back to the Year Books of the 14th century and the meaning is the same:—

"Audita Querela is given rather by Equity than by Common Law" (*b*).

"And this suit is ordained by Parliament because I cannot have a recovery at Common Law" (*c*).

Let us look at the matter concretely. The courts have been examining lately some very modern developments in social relations, and adding "Boycott" and "Strikes" to the digests as additional headings. Now, from what source are the judges getting the law upon these subjects? Is it out of that gaseous Common Law which, if one may surmise, has existed from all eternity (for no one has ever heard of its creation, or other genesis)? Or are we to believe in special divine inflations for the birth of each new opinion—veritable modern themistes instead of the apocryphal inspirations of ancient days? Before trusts and combinations commenced to affright us, the English courts had little difficulty in asserting that

(*y*) § 15.

(*z*) § 72; and see 381.

(*a*) § 379.

(*b*) 17 Ed. III, 370.

(*c*) *Ib.* 386.

"It is in vain to say that a thing might have been done by an individual but cannot be done by a combination of persons" (d).

Now-a-days, however, they go much more warily, if very much less logically and lucidly, with the result that Mr. Haldane (in the front rank of English Counsel), undertaking to explain the two latest judgments of the House of Lords (e), is forced to acknowledge that he does not understand them himself (f) and must perforce await further revelations (of the Common Law?) at the hands of the judicial mediums.

Heaven apart, whence are the judges getting this new law? It is not in the statutes, nor is it in the decisions. Whence then? From the Common Law enwrapped in the palpitating tissues of the heart, of the people, or its diaphragm? The soul, as everybody knows, locates itself in the—well, perhaps we have trouble enough on hand for the present. But this Common Law—do somebody tell us where it is, and what it is, and is it like anything that we know something about? Is it regulating the trusts at present, do you think? And if so, is it making much of a job of it? Judges applying their notions of justice to new conditions, we can all understand; and to certain people that is what they seem to be doing, in this business of manufacturing trust and strike law. But the idea of judges labouriously delving into nothing, nowhere, and pretending that they are unearthing primeval aphorisms, axioms and principles placed there by omnipotence or by nature (by behemoths, just as likely) for use in these later stages—well, for one, I don't believe it. And is the Common Law only one law, since the noun is in the singular? Or is it one compressed epitome of all law, some primeval protoplasmic germ with wonder-

(d) *Mogul Steamship Co. v. McGregor*, (1892) A.C. 25.

(e) *Allen v. Flood* (1898) A.C. 1; *Quinn v. Leathem* (1901) A.C. 495.

(f) "These decisions (he says) disclose divergencies of view amongst distinguished men which make it hopeless for anyone to try to say with accuracy or certainty what the law is. Speaking for myself, I should be very sorry to be called on to tell a Trade Union Secretary how he could conduct a strike lawfully. The only safe answer I could give would be that having regard to the diverging opinions of the judges, I did not know." (Contemporary Review, March 1903, p. 368.) But why not take a look, Mr. Haldane, at the Common Law? Why, upon the theory that judges merely expound and interpret the Common Law, not read and expound a little yourself? Why? Because each judge is consulting, not any body of law, "true," "common," or otherwise, but is declaring what to him with all his personal idiosyncracies, his dreads, his antipathies, his sympathies, his forecasts, his whole mental characteristics and climate—what to his particular, brain, appears to be best.

ful evolutionary potentiality, from which everything else shall in good time proceed? Radium, we learn, is untiring and unremitting in its emanation of X rays, electrons, and particles of matter (exploded atoms, they say), and never is it a whit the poorer or the weaker—is the Common Law anything like radium?

Consider also our laws of estoppel and waiver; think you that we shall ever dig them up, either in London or Washington? Or for them too must we go to “judicial legislation” alone?

Or take our maritime law. Where did it come from? Out of the Common Law or from Lord Stowell principally? For example, the master of a ship can, under certain circumstances, bind a cargo by respondentia bond; was that law derived from the eternal verities? or was it “from the general policy of the law”—the general policy of Lord Stowell, we may say? Seamen’s lien for wages, salvage, etc.; are these laws founded upon imperishable memories of some Edenic or, at least, Noachean code? Shall we say that they were discovered in the Pleistocene? or shall we confess that their creator was the modern Lord Stowell?

Turn to the law of bills and notes, and you change the founder merely, not the foundation or the methods of building. Here Lord Mansfield is at work, Lord Stowell there. And we find no more law merchant in the one case than law ship-owner in the other. Days of grace are given by law because of the previous *custom* of merchants, just as thirteen shrimps go to the dozen; that is because in the bill case ten days really meant thirteen, and in the shrimp case twelve meant thirteen. This is neither law-merchant nor law-shrimp, but a well-known bit of the law of contracts.

Getting away from this feature (the contractual feature) of the law of bills and notes, and examining the slow evolution of the general law relating to the subject itself, one cannot do better than quote from Professor Thayer’s excellent treatise upon “Evidence at the Common Law.” At the inception of some question there is usually, not a fixed common law to go to, but, on the contrary, a very wide difference of opinion, and this is followed “by fixing *in particular cases* an outside limit of what is rationally permissible,” and then step by step growing more precise:—

“In this way the legal rule as to what is reasonable notice of the dishonour of a bill of exchange was established: juries were resisted by the court, when they sought to require notice within an hour, and on the other

hand when they tried to support it if given within fourteen days, or even within three days when 'all were within twenty minutes' walk of each other' (*Tindal v. Brown*, 1 T.R. 168, 9); and so the modern rule was fixed that ordinarily notice is sufficient if given on the following day" (g). "The process is now going on as regards the question of timely notice to the indorser of a demand note" (h).

What a pity, after all, that there was not a "Law Merchant," or a Common Law, wherewith to settle long ago all these age-long controversies; or if indeed there was one, that it has been so irretrievably lost. But may we not yet hope? In London the other day a pachyderm which had lain lost for some 150,000 years was accidentally dug up.

JOHN S. EWART.

Winnipeg, Manitoba.

(g) P. 214, 215, 226.

(h) P. 215. Citing *Paine v. R. R. Co.*, 118 U.S. 152, 160.

Correspondence.

JUDICIAL FRILLS.

To the Editor of the CANADA LAW JOURNAL :

SIR,—No one may hereafter be heard to say that *noblesse* doesn't *oblige* the editors of legal publications in the United States. In the last number of the *American Law Review* I find the following editorial reference (p. 733) to one of the Federal judges : " Mr. United States Circuit Judge LeBaron B. Colt, of Rhode Island." Surely the " Genius of Democracy " will clamour for " the wig and the ermine, the buckles and sword," of the effete English Bench after this !

QUIDNUNC.

ENGLISH CASES.

*EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.*

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**COMPANY—DEBENTURES — FLOATING CHARGE—EQUITABLE INCUMBRANCES—
NOTICE—PRIORITY.**

In re Valletort, Ward v. Valletort (1903) 2 Ch. 654, was a contest for priority between the creditors of a joint stock company. Debentures were issued under which one set of creditors claimed, which constituted a floating charge on the assets of the company and the terms of which precluded the company from creating any prior charge, but the manager of the company, in forgetfulness of this provision, deposited the title deeds of the company with a bank to secure the present and future overdraft of the company's current account. The bank knew that debentures had been issued and held some of them as security for another customer's account, but made no inquiry in the matter. It was contended by the debenture holders that the possession of the debentures as security affected the bank with notice of their contents so as to preclude them claiming priority in respect of their equitable mortgage by deposit. But Eady, J., held that the possession of the debentures as security for another customer's account did not affect the bank with notice of the contents of the debentures in their dealings with the company; and that the fact of the company's managing director making the deposit of the title deeds was an implied representation that the company could give a valid first charge, and though the bank was aware of the debentures it was not put on inquiry as to their terms. Subsequent to the deposit of the deeds the company issued a debenture as further security to the bank which was expressly made subject to the first issue of debentures, but it was held that this fact did not put the bank on inquiry as to the terms of the first issue, so as to postpone their equitable mortgage in respect of advances subsequently made.

EQUITABLE WASTE — ORNAMENTAL TIMBER — “PLANTED OR LEFT FOR ORNAMENT OR SHADE” — EVIDENCE — PRESUMPTION — INJUNCTION.

Weld-Bhucdell v. Wolseley (1903) 2 Ch. 664, was an action to restrain equitable waste by the committee of a lunatic's estate. The plaintiff was tenant in remainder and claimed that certain timber trees which the committee proposed to sell had been planted or left for ornament or shade. A case was stated by a referee as to whether the plaintiff had made a prima facie case, and Eady, J., ruled that he had, and that in such cases the question is not whether the trees in question were ornamental, or useful for shelter, but whether they were in fact planted or left for those or either of those objects.

CO-SURETIES — INSURANCE OF MORTGAGE DEBT — COVENANT TO PAY WITH LIMIT OF LIABILITY — CONTRIBUTION.

In re Denton, License Insurance Corporation v. Denton (1903) 2 Ch. 670. The plaintiffs in this case had insured a mortgage debt secured by a mortgage made by one Hannay for £4,000 in which one Denton had joined as surety; by the mortgage Hannay and Denton jointly covenanted to pay the whole mortgage debt, but subject to a proviso that Denton's liability should be limited to £1,000. The mortgage also contained a covenant by Hannay alone to insure and keep insured the mortgage debt with the plaintiff company, and the plaintiffs had issued a document purporting to be a policy insuring the payment of the whole amount of the mortgage debt, and agreed that if the mortgagor made default the plaintiffs would pay, and that thereupon the mortgagees should assign the mortgage debt and all securities to the plaintiffs, and do all things necessary for the purpose of enforcing any rights or remedies or of obtaining relief or indemnity from other parties, to which the plaintiffs should be subrogated on payment under the policy. The mortgagor made default and the plaintiffs had paid the debt, which with interest, etc., amounted to £5,000. The mortgaged property had been realized and had produced £4,000, leaving a deficiency of £1,000, the whole of which the plaintiffs claimed to recover from Denton's estate, he having died. It was contended by the plaintiffs that they were insurers and not sureties, and at all events not co-sureties with Denton because their contract was subsequent and independent of the mortgage. Eady, J., was inclined to think the plaintiffs were merely sureties notwithstanding-

ing the form of the contract, but whether sureties or insurers was immaterial, because, though the mortgage and policy were separate instruments they were nevertheless parts of the same transaction, the procuring of the policy being expressly provided for in the mortgage, that therefore notwithstanding the form of the documents they were in effect co-sureties with Denton in unequal amounts, and were bound to contribute in the like proportions to the payment of the deficiency, and as the plaintiffs were liable for the whole debt, which had been ascertained to be £5,000, and Denton for only £1,000, the proportions of their respective liabilities were 5/6 and 1/6.

SHIP—CHARTER PARTY—DISCHARGE OF CARGO—DEMURRAGE.

In *Hutlhen v. Stewart* (1903) A.C. 389, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey, Robertson and Lindley) have decided that where a clause in a charter party provides that the cargo is to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, subject to a special exception in case of a strike, or lockout, or epidemics, demurrage is not payable if the discharge is effected with the utmost despatch possible, consistent with the custom of the port, and having regard to the facilities of delivery and all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

TESTAMENTARY POWER—POWER OF APPOINTMENT—COVENANT TO EXERCISE TESTAMENTARY POWER FOR BENEFIT OF CREDITOR—PRIORITIES—APPOINTED FUND—(R.S.O. c. 337, s. 20).

In *Beyfus v. Lawley* (1903) A.C. 411, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) have affirmed the decision of the Court of Appeal *In re Lawley, Zaiser v. Lawley* (1902) 2 Ch. 799 (noted ante, vol. 39, p. 102) where it was held that a borrower having a general testamentary power of appointment over a fund could not, by exercising it in favour of the lender as security for a loan, give the lender any priority over other creditors in regard to the fund, because by the exercise of the power the fund, ipso facto, becomes general assets of the estate of the appointor, (see R.S.O. c. 337, s. 20).

CONTRACT—ASSIGNMENT OF CONTRACT—RIGHT OF ASSIGNEE OF CONTRACT TO SUE ALONE WITHOUT JOINING ASSIGNOR—COMPANY - PARTIES.

In *Tollhurst v. Associated Portland Cement Manufacturers* (1903) A.C. 414, the House of Lords (not without some difference of opinion) have affirmed the decision of the Court of Appeal (1902) 2 K.B. 660 (noted ante, vol. 39, p. 155). Two points were involved in the appeal, one as to the effect of the contract in question and the other as to the right of an assignee of it to sue alone without joining their assignors. The contract was to supply at least 750 tons of chalk a week, and so much more as the contractees might require for the purpose of their business, the manufacture of cement. The contractees went into liquidation and the contract was assigned to the plaintiffs, a new company which carried on the same business but on a larger scale. The Court of Appeal held that there was a personal element in the contract, which prevented its assignment, so as to enable it to be enforced by the assignees without joining the assignor; but that the contract was subsisting and might be enforced by the assignor for the benefit of their assignee. The majority of their lordships (Macnaghten, Shand and Lindley) held that upon the true construction of the contract it must be read as if made with the original contractees, their successors and assigns, and the assignees could enforce it without joining their assignors, but Lord Halsbury, L.C., doubted, and Lord Robertson dissented from this conclusion.

MINES—EXPROPRIATION—NOTICE TO TREAT—SUBSEQUENT RISE IN VALUE OF MINERALS—EVIDENCE.

The Bwlfa and Merthyr Dare S.S. Collieries v. The Pontypridd Water Works Co. (1903) A.C. 426, is a case in which there has been some fluctuation of opinion. The question was where the working of mining lands is sought to be stopped, subject to compensation being made, whether in fixing the compensation to be paid a rise in value of the minerals, after the notice to treat was served, can be taken into account. The Divisional Court held that it could (1901) 2 K.B. 798 (noted ante vol. 38, p. 16); the Court of Appeal (1902) 2 K.B. 135 (noted ante vol. 38, p. 646) held that it could not; and now the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Robertson and Lindley) have unanimously held that it could, thereby affirming the original decision. Their lordships held that the notice to treat did not operate as a sale of

the minerals, the property remained in the mine owners, who were only prevented from working them. They consider therefore that the analogy of a sale does not hold good.

MUNICIPAL CORPORATION—CONTRACT—VALIDITY—MEMBERS OF CORPORATION DIRECTLY OR INDIRECTLY INTERESTED OR CONCERNED IN—ASSIGNMENT OF CONTRACT:

London Electric Lighting Co. v. London (1903) A.C. 434, deals with a question of municipal law which it may be well to note. By an English statute no member of a municipal corporation can be directly or indirectly interested in any contract made or entered into by the corporation for the execution of any works authorized by the Act, inter alia, lighting contracts, on pain of the contract being null and void. At the time a contract for lighting was made with a syndicate no members of the corporation were interested in the syndicate. Afterwards with the consent of the municipal authorities the contract was assigned by the syndicate to a company in which several members of the corporation were shareholders. The Court of Appeal held that this did not invalidate the contract, which was valid at the time it was made, and the House of Lords (Lord Halsbury, L.C., and Lords Davey and Robertson) affirmed that decision; but contracts made with companies in which members of the corporation were shareholders were held to be within the statute and invalid.

CANADIAN CUSTOMS ACT, 1897, s. 4—DUTY ON IMPORTED GOODS—FOREIGN-BUILT SHIP.

In *Algoma Central Ry. Co. v. The King* (1903) A.C. 478, the Judicial Committee of the Privy Council (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Davey, Robertson and Lindley, and Sir Arthur Wilson) have affirmed the decision of the Supreme Court on a question of constitutional law. The Court of Exchequer held, and the Supreme Court affirmed the decision, that the Canadian Customs Act (1897) imposing a duty on foreign-built ships imported into Canada was not in any way repugnant to the Imperial Merchants' Shipping Act (1894), and that the duty (as specified, s. 4, sched. A., item 409) was payable in respect of a ship built in the United States and brought to Canada.

STREET RAILWAY—REMOVAL OF SNOW FROM TRACKS—ELECTRIC SWEEPER.

In *Montreal v. Montreal Street Railway Co.* (1903) A.C. 482, the plaintiffs had entered into a contract with the defendant company, whereby, inter alia, the defendants bound themselves to keep their track free from ice and snow. In order to carry out this part of their agreement they used an electric sweeper which brushed the snow off the track on to the other part of the roadway of the street on either side, causing a trench which was inconvenient for other traffic. The action was brought to test their right to do this, and the Supreme Court of Quebec found that the company was bound to keep its tracks clear from ice and snow, but were not bound to remove from the streets or convey elsewhere the snow so removed, and that they were entitled without the consent of the city to use an electric sweeper for the purpose of so cleaning their tracks; and with this decision the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley, and Sir A. Wilson) agreed. It was argued that the railway's action amounted to a nuisance and the case was within the principle of *Ogaton v. Aberdeen* (1897) A.C. 111, where the spreading of a briny mixture on the streets by the defendants, was held to be illegal and a nuisance, but their lordships held that that case did not apply because here the defendants were authorized by the municipality to do the act complained of.

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In *Graves v. Gorrie* (1903) A.C. 496, the Judicial Committee of the Privy Council (Lords Macnaghten, Shand, Robertson and Lindley, and Sir A. Wilson) have affirmed the judgment of the Court of Appeal for Ontario, 3 O.L.R. 697, holding that the provisions of the Imperial Fine Arts Copyright Act, 1862 (25 & 26 Vict., c. 68), do not extend to Canada, on the ground that there is nothing in the Act to indicate an intention on the part of the Legislature to extend the limits within which copyright might be enjoyed thereunder to any part of the British Dominions outside the United Kingdom. *Tuck v. Priester*, 16 Q.B.D. 629, was approved.

SHIP—SALVAGE—SHIP SALVED THE PROPERTY OF THE CROWN.

Young v. S S. Scotia (1903) A.C. 501, was an appeal from the Supreme Court of Newfoundland in an action to recover for salvage services rendered the Steamship Scotia. The court found that the ship at the time the services were rendered was and is still the property of the Dominion of Canada, and therefor the public property of His Majesty, and therefore not liable to claims, for salvage. The Judicial Committee (The Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson and Lindley, and Sir A. Wilson) held that the judgment was right, but at the same time expressed a strong opinion that the claim was a meritorious one and should be paid.

PATENT—INFRINGEMENT—COUPLER—NEW DEVICE FOR EFFECTING OBJECT COVERED BY PRIOR PATENT.

Consolidated Car Heating Co. v. Came (1903) A.C. 509, was an action to restrain the alleged infringement of a patent. The patent of the plaintiffs was for a coupler for hose attached to railway cars so as to secure a steam-tight fastening which would permit an automatic separation of the hose when the car was uncoupled. The defendant's coupler was in all respects the same as the plaintiffs' but produced the required result without one particular feature of the plaintiff's coupler called a rib or hinge joint, which was proved to have been a very material part of the plaintiffs' coupler and their specification shewed they never contemplated its omission. The Quebec Court of King's Bench held that there had been no infringement, because the defendant's coupler was a new way of accomplishing the end aimed at by the plaintiffs' coupler, and with this conclusion the Judicial Committee of the Privy Council (Lords Davey, James and Robertson, and Sir A. Wilson) agreed.

PRACTICE—LEAVE TO APPEAL TO PRIVY COUNCIL FROM SUPREME COURT—R.S.C. C. 135, S. 71.

In *Clergue v. Murray* (1903) A.C. 521, an application was made to the Privy Council for leave to appeal from a judgment of the Supreme Court of Canada. Under R.S.C., c. 135, s. 71, no appeal lies from such a judgment except by special leave of His Majesty in Council. The Judicial Committee (Lords Davey, James and Robertson, and Sir A. Wilson) refused leave following

Prince v. Gagnon (1882) 8 App. Cas. 103, on the ground that where a suitor has a choice of appealing either to the Supreme Court or to His Majesty in Council, and elects to appeal to the Supreme Court, special leave to appeal therefrom should not be given except in a very strong case. The reporter notes two cases in which the committee granted leave, one where there had been an equal division in the Supreme Court, and the other involving a question of law affecting the rights of the Crown.

LORD'S DAY ACT—(R.S.O. 1897, 346)—**POWERS OF LOCAL LEGISLATURE**—**POWERS OF DOMINION PARLIAMENT**—**CRIMINAL LAW**—**B.N.A. ACT, s. 91 (27)**—**PRACTICE AS TO QUESTIONS REFERRED.**

Attorney-General of Ontario v. Hamilton Street Ry. (1903) A.C. 524. This was an appeal from the Ontario Court of Appeal on the question of the validity of the Ontario Lord's Day Act, R.S.O. 1897, c. 246. In the case stated for the opinion of the court besides the general question as to the constitutionality of the Act, there were a number of other questions in which the opinion of the Court was asked as to the powers of the Legislature to prohibit the doing of certain acts, and as to the meaning of certain sections. The Judicial Committee of the Privy Council (The Lord Chancellor and Lords Macnaghten, Shand, Davey, Robertson and Lindley) confined themselves to answering the principal question, and declared the Act to be an invasion of the exclusive legislative authority of the Dominion Parliament under the B.N.A. Act, s. 91 (27) in relation to criminal law, and held that the other questions propounded could only be properly raised in concrete cases, and were not the proper subject for judicial decision as being mere hypothetical or speculative questions, upon which it would be impossible to pronounce any conclusive opinion. The effect of the decision, as we formerly pointed out, appears to be to leave the old C.S.U.C., c. 104, as being still in force. See volume of Acts of Provinces of Canada not repealed, p. 243.

TRADE UNION—**LIABILITY OF TRADE UNION FOR WRONGFUL ACTS OF AGENTS**—**CONSPIRACY**—**ILLEGALLY PREVENTING WORKMAN FROM OBTAINING EMPLOYMENT.**

Giblan v. National Amalgamated Labourers' Union (1903) 2 K.B. 600, was an action brought by a member of a trades union against the union and its general and local secretaries, claiming

damages for loss of wages occasioned by the defendants having illegally prevented the plaintiff from getting employment, and also an injunction to restrain the continuance of the acts complained of. The plaintiff had been treasurer of a local branch of the defendant union, and a sum of £38 was claimed to be due by the plaintiff as such treasurer, which he had failed to pay, and for which judgment had been recovered against him. In February, 1900, the defendant the general secretary of the union went to the foreman of the firm where the plaintiff was employed and notified him that, unless the plaintiff was dismissed, the rest of the union men would strike. Whereupon the plaintiff was dismissed, and was out of employment for three weeks. He then got work elsewhere; being still in default to the union, he was at a general meeting expelled, and his expulsion was notified to all the local branches, and thereafter several union men were fined for working with the plaintiff. The local secretary subsequently went to the plaintiff's employer and notified him unless the plaintiff was discharged the union men in his employ would be called out, and similar notices were given to three other employers with whom the plaintiff had got work, resulting in each case in his dismissal; another ground for the defendant's action being that the plaintiff, a non-unionist, was obtaining employment when union men were out of work. The action was tried before Walton, J., and on the answers of the jury to certain questions submitted to them, the learned judge, in a considered judgment, held that the general secretary alone was liable to the plaintiff for the acts complained of, and dismissed the action as to the other defendants: but the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) came to a different conclusion, and held that the union was responsible for the acts of their general secretary, and that the evidence shewed that there had been a conspiracy on the part of the officers of the union to prevent the plaintiff getting or retaining work, in order to compel him to pay the debt he owed the union, which was in effect an attempt on their part to effect a legal object by illegal means, and that on the principle laid down in *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259, at page 265, the union was liable for the acts of its officers.

PRINCIPAL AND AGENT—SECRET PROFIT—RIGHT OF AGENT MISCONDUCTING HIMSELF TO COMMISSION.

Andrews v. Ramsay (1903) 2 K.B. 635 lays down a very wholesome rule, which ought to tend to fair and honest dealing by agents. The strange mental obliquity whereby an agent employed by his principal for a certain purpose, conceives himself also entitled to make a profit out of the transaction unknown to his principal, is an insidious evil that needs to be rooted out; henceforth, an agent who enters on that slippery path should know that his principal may not only recover from him the secret profit he has treacherously endeavoured to secure, but also any compensation he may have retained with the assent of his principal and which he would have been legitimately entitled to, had he acted honestly. In short, according to the judgment of the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ) an agent who makes a secret profit renders himself liable to an action by his principal to recover not only his illegitimate gains, but also the legitimate reward he might otherwise have been entitled to.

INSURANCE—BREACH OF WARRANTY BY SHIPOWNER—WARRANTY OF SEAWORTHINESS—NEGLIGENCE OF MASTER—PROXIMATE CAUSE OF LOSS.

In *Greenock Steamship Co. v. Maritime Ins. Co.* (1903) 2 K.B. 657, the Court of Appeal have affirmed the decision of Bigham, J. (1903) 1 K.B. 367 (noted ante vol. 39, p. 357.)

BILL OF LADING—HARTER ACT (ACT OF CONGRESS OF U.S.A. 1893)—“FAULTS OR ERRORS IN MANAGEMENT OF VESSEL.”

In *Rowson v. Atlantic Transport Co.* (1903) 2 K.B. 666, the Court of Appeal have also affirmed the judgment of Kennedy, J. (1903) 1 K.B. 114 (noted ante vol. 39, p. 192). In this case it may be remembered the action was brought to recover damages to a cargo occasioned by the mismanagement of the refrigerating apparatus, which Kennedy, J. held to be “an error in the management of the vessel,” for which, under the bill of lading, the owners were responsible.

CONTRACT—SPECIFIC PERFORMANCE—FAILURE OF CONSIDERATION—OBJECT OF ENTERING INTO CONTRACT FRUSTRATED—DEMISE OF SHIP—REPUDIATION OF CONTRACT BEFORE TIME FOR PERFORMANCE.

Herne Bay Steamboat Co. v. Hutton (1903) 2 K.B. 683. This, and the two following cases, arise out of the postponement of the coronation festivities. In this case the defendants entered into an agreement in writing with the plaintiff, whereby it was agreed that

the plaintiffs' steamer *Cynthia* should be "at the disposal" of the defendant on June 28, to take passengers to Herne Bay "for the purpose of seeing the naval review," announced to take place on that day, "and for a day's cruise round the fleet, and also on June 29 for similar purposes: price £250, payable £50 down and balance when ship leaves Herne Bay." The £50 was paid when the agreement was signed. On June 25 the review was cancelled, whereupon the plaintiff telegraphed to the defendant for instructions, stating that the ship was ready, and requesting payment of the balance. Receiving no reply the plaintiffs used the ship on 28th and 29th June for their own purposes, and made a profit. On June 29 the defendant repudiated the contract in toto. The fleet remained anchored at Spithead for the two days. The action was brought to recover £200 less the profits realized from the use of the vessel on June 28 and 29. Grantham, J., who tried the action dismissed it; but the Court of Appeal (Williams, Romer and Stirling, L.JJ.) reversed his decision, because it appeared by the contract that the defendant had two objects in view. (1) to take people to see the review and (2) to take them round the fleet: that though the first object was frustrated, the second could have been carried out, and, therefore, the review not being the sole basis of the contract there was not a total factor of consideration, and the case did not come within *Taylor v. Caldwell*, 3 B. & S. 826. The defendant set up that the vessel had not been placed at his disposal on the days named, but the Court of Appeal held that before the time came for performance the defendant had repudiated his obligations under the contract and therefore the plaintiffs properly employed the vessel in her usual daily services.

CONTRACT—HAPPENING OF EXPECTED EVENT—BASIS OF CONTRACT—IMPLIED CONDITION.

In *Krell v. Henry* (1903), 2 K.B. 740, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would pass along that street. The contract contained no express reference to the processions or to any purpose for which the flat was hired, but the Court found that from necessary inferences drawn from the surrounding circumstances it was regarded by both contracting parties that the taking place of the procession on the days named was the foundation of the contract. A deposit

was paid at the time of the contract, but the procession having been abandoned the defendant refused to pay the balance of the agreed rent, and to recover the same the action was brought. In this case the Court of Appeal (Williams, Romer and Stirling, L.JJ.) held that the doctrine of *Taylor v. Caldwell* did apply, and that the plaintiff was therefore not entitled to succeed. The distinction between this and the preceding case is somewhat finely drawn: and it might be said that the purpose for which the defendant required the flat was a matter with which the plaintiff had nothing to do, and that the defendant took the risk of the object failing. The fact that in the preceding case besides seeing the contemplated review the defendant also intended to cruise around the fleet, turned the scale; would the intention of reserving the flat for some subsidiary purpose, such as giving a "luncheon party," as well as seeing the processions, have turned the scale in the present case?

CONTRACT—CONSTRUCTION—RIGHTS OF PARTIES WHEN PERFORMANCE OF CONTRACT HAS BECOME IMPOSSIBLE COSTS.

Civil Service Co-operative Society v. The General Steam Navigation Co. (1903) 2 K.B. 756, is the third case above referred to. In this case also the plaintiffs in March, 1902, hired from defendants a vessel for three days to be at their sole disposal for the purpose of taking passengers to see the naval review on the occasion of the King's coronation in June or July, 1902. £250 was paid down, and the balance of the hire, £1,250, was to be paid "ten days before the date of the review." On the 18th June the balance was paid, the review having been fixed to take place June 28th. The review was postponed on June 25th, and the plaintiffs then gave notice to the defendants that they would not require the steamer. The defendants before the postponement of the review had incurred expenses to the amount of £500 in fitting out the vessel for the trip and other things in part performance of the contract. The plaintiffs sought to recover £1,500 as having been paid on a consideration which had failed. Bigham, J., who tried the action, dismissed it, but without costs. The Court of Appeal (Lord Halsbury, L.C., Lord Alverstone, C.J., and Cozens-Hardy, L.J.) held that the action was rightly dismissed, and approve the decision of the Divisional Court in *Blakeley v. Muller*, and *Hobson v. Pattenden*, which are reported in the note on p. 760, and which were County Court actions

brought under similar circumstances to recover moneys paid for seats to view the coronation procession. On the question of costs, however, the Court of Appeal reversed Bigham, J.'s order, holding that there was no ground for depriving the defendants of their costs, the fact that it was "a hard case" not being deemed a sufficient reason.

WILL—PROBATE—FRAUD AND UNDUE INFLUENCE UNSUCCESSFULLY SET UP—COSTS.

Wilson v. Bassil (1903) P. 239, was a probate action in which the defendant set up that the will was obtained by fraud and undue influence. The facts surrounding the making of the will brought the case within the principles laid down in *Brown v. Fisher* (1890) 63 L.T. 465; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; and *Tyrrell v. Paintore* (1894), P. 151, and imposed upon the plaintiff propounding the will the onus not only of proving its valid execution, but that it was not obtained by fraud and undue influence, and that it did truly express the last will of the testator. Under these circumstances, although the defendant failed, Walton, J., held that the defendant was entitled to payment of his party and party costs out of the estate next after payment of the plaintiff's costs as between solicitor and client.

PROBATE—NUNCUPATIVE WILL—SOLDIER ON ACTIVE SERVICE—TESTAMENTARY DISPOSITION—"EFFECTS TO BE CREDITED"—WILLS ACT (1 VICT., C. 26), S. 11—(R.S.O., c. 128, s. 14).

In the goods of Scott (1903) P. 243, was an application for administration with the contents of a nuncupative will annexed. The testator was a soldier in active service at the time of his death. The declaration was made by the deceased to his commanding officer as follows: "In the event of my death in South Africa I desire all my effects to be credited to my sister, Miss N. Scott, 39 Hanley Road, London, N." This, Jeune, P.P.D., held to be a sufficient will and administration was granted as prayed.

HIGHWAY LAND BETWEEN FENCES SEPARATING ROADWAY FROM ADJOINING LAND—DEDICATION—PRESUMPTION.

In *Harvey v. Truro* (1903) 2 Ch. 638, Joyce, J., decided that in the case of an ordinary roadway running between fences, although the space between them be of a varying and unequal width, the right of passage or way *primâ facie*, in the absence of evidence to

the contrary, extends to the whole of the ground between the fences and not merely to the metalled portion, and that the whole space is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption—moreover he reaffirms the rule that mere disuse of a highway for any length of time cannot avail to deprive the public of their rights in respect of it.

MORTGAGOR AND MORTGAGEE—SALE UNDER POWER—AUCTION—PURCHASE BY OFFICER OF MORTGAGEE SOCIETY—INVALIDITY OF SALE.

Hodson v. Deans (1903) 2 Ch. 647, was a redemption action. The plaintiff had mortgaged the land to the trustees of a friendly society to secure an advance. Under a power of sale the trustees had offered the property for sale by auction, and an officer of the society who knew the reserved bid, and took part in instructing the auctioneer who conducted the sale, attended the sale and bought the property for himself, the plaintiff attended the sale and bid against him. The sale was at a small undervalue. Notwithstanding this sale Joyce, J., held that the property was redeemable and gave the plaintiff the relief claimed, because the society could not have sold privately to one of their officers, and it made no difference that the sale was by auction.

TIME—COMPUTATION OF TIME—"THREE YEARS FROM THE PASSING OF THIS ACT—STATUTE—CONSTRUCTION.

The Goldsmiths Co. v. The West Metropolitan Ry. Co. (1904) 1 K.B. 1, deserves a brief notice, because the Court of Appeal (Collins, M.R., and Mathew, L.J.) were called on to reverse a well-settled rule in the construction of statutes. By the statute in question a company was empowered to expropriate lands within "three years from the passing of this Act." The Act received the Royal assent on August 9, 1899, and on August 9, 1902, the company gave the plaintiffs notice to treat. It was contended by the plaintiff that the notice was too late because the day of passing the Act was to be included in the computation of the three years, but the Court of Appeal agreed with Walton, J., that it was to be excluded.

 REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Drainage Referee.] *WIGLE v. TOWNSHIP OF GOSFIELD SOUTH*. [Jan. 5.
Drainage—Township drain—Division of township—Damages for construction—Joint claim—Amendment of statute—Limitation clause—Recurrence of damages.

Pursuant to the judgment of the Court of Appeal of March 2, 1901 (1 O.L.R. 519), the Drainage Referee July 25, 1901, added the township of Gosfield North as defendants, and they filed a statement of defence on Sept. 10, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On April 15, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of the complaint arose.

Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on Sept. 10, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence. Judgment of the Drainage Referee reversed.

Langton, K.C., and *A. H. Clarke*, K.C., for appellants, the defendants. *Mabee*, K.C., for plaintiffs.

Full Court.] *DOMINION BANK v. EWING.* [Jan. 25.
Promissory note — Forgery — Notice — Repudiation — Ratification — Estoppel—Severance of liability.

The plaintiffs were endorsees of a promissory note for \$2,000 dated August 14, 1900, purporting to be made by the defendants to the order of the Thomas Phosphate Company. The manager of the company had as a matter of fact forged the maker's name, but got the Bank to discount the note and place the proceeds to the credit of the company on August 15. Cheques were thereupon issued by the company against the proceeds, which

left a balance to their credit at the close of business on the 15th of \$1,611.55, on the 16th of \$1,355, and on the 17th of \$84. On the 15th the Bank notified the defendants, who resided in Montreal, that the note, describing it, would fall due on December 19, 1900, which notification the defendant received on the following day. Instead of replying to the Bank, however, the defendants kept up a correspondence with the forger urging him to settle the matter. On December 4th the plaintiffs again wrote to the defendants about the note and when it would fall due. It was not until December 10th that the defendants wrote to the plaintiffs stating that the note was not their note.

Held, that the defendants should have answered a business communication like that of the bank's of August 15th according to the dictates of common sense and fair dealing, and that their silence being coupled with resulting damage created an estoppel against them.

Held, also, that the plaintiffs' recovery should not be restricted to \$1,355, or any lesser sum which was actually paid out after the time when the plaintiffs should have had notice from the defendants of the forgery, but they were entitled to recover the full amount of the note. The estoppel went to the extent that the defendants must be taken to be the makers of the note which the plaintiffs had bought and paid full value for, and there was no reason for saying that their liability was to be severed.

*H. S. Osler, K.C., and Britton Osler, for defendants (appellants).
Shepley, K.C., and Kellcher, for plaintiffs (respondents).*

HIGH COURT OF JUSTICE.

Osler, J.A.]

IN RE WAY

[Dec. 5, 1903

*Will—Construction—Residuary bequest—Personal effects—Mortgage—
Debts and expenses of administration—Ratable charge in real and
personal estate.*

A will was in part as follows; "My will is first that all my just and lawful debts, and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows: I give devise and bequeath absolutely to my loved wife . . . all my furniture, books, plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children. The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate.

Held, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." "These words occurring in a residuary gift were not to be read as restricted to things ejusdem generis with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate.

Held, also, following *Re Thomas*, 2 O.L.R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values: Devolution of Estates Act, R.S.O. 1897 c. 127, s. 7.

D'Arcy Tate, for executors and S. J. Way. *J. Dickson*, for other parties.

MacMahon, J.] *MAGER v. CANADIAN TIN PLATE CO.* [Dec. 15, 1903.
Prohibition—Money demanded—Final judgment—Entry of a for want of dispute notice—R.S.O., c. 60, s. 113.

An action in a Division Court in which the particulars described the plaintiff's claim as for "money received by the defendants for the use of the plaintiff being money obtained from the plaintiff by the defendants by false representations" in an action for a "money demanded" within s. 113 of the Division Courts Act, R.S.O., c. 60, and a motion for prohibition to restrain proceedings upon a judgment entered in default of a dispute notice was refused.

Middleton, for motion. *W. Davidson*, contra.

Cartwright, Master.] *KIRK v. CITY OF TORONTO.* [Dec. 22, 1903.
Jury notice—Injury by steam roller—Non-repair of street—O. J. Act, 104.

Injuries caused by the negligent use of a steam roller belonging to a Municipal Corporation and operated by a contracting company on a street of the latter are not caused through non-repair of the street and a motion to strike out a jury notice under s. 104 of the Judicature Act was refused.

Nasmith, for plaintiff. *Chisholm*, for city. *J. E. Jones*, for the contractors.

Divisional Court.] *GARNER v. TOWNSHIP OF STAMFORD.* [Dec. 28, 1903.

Evidence—Negligence—Statements of persons injured—Res gestæ.

In an action brought by the father and mother of a young girl to recover damages in respect of her death which resulted as was alleged from a fall on a stone in a highway under the control of the defendants. It was proved that the stone in question had been allowed to remain for a long

time in a part of the highway used by foot passengers ; that several persons had tripped over it ; that the deceased had left her house on a certain evening to go to another house the direct route to which would be by the highway in question ; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself ; that about the time she would in the ordinary course have been passing the place in question a witness saw a young girl whose description answered to that of the deceased lying beside the stone, who stated to him that she had fallen on the stone and hurt herself ; and that the girl died from peritonitis, resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall upon a stone ;

Held, affirming the judgment of MACMAHON, J., that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proven, her statement while lying near the stone, were not admissible in evidence as part of the *res gestæ*, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection which alone are properly admissible as part of the *res gestæ*. *Regina v. McMahon* (1889), 18 O.R. 502, applied.

Held, however, reversing the judgment of MACMAHON, J., that the identity of the deceased with the person seen by the witness lying near the stone was established ; that, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone ; and that as the highway was by reason of the presence of the stone in a dangerous condition and out of repair the defendants were liable.

Masten and McBurney, for appellant. *Hill*, for the Town of Niagara Falls. *Griffiths*, for the Township of Stamford.

Trial—Boyd, C.]

[Dec. 28, 1903.]

ELGIN LOAN AND SAVINGS CO. *v.* NATIONAL TRUST CO.

Company—Shares—Deposit of certificates—Bailment—Trust—Detention—Excuse—Trustee Act—Winding-up direction of Master—Jurisdiction—Detinue—Measure of damages—Price of shares.

The plaintiffs became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they acknowledged the receipt of the certificates, and agreed to hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept

safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put in the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound-up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Company, and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations the plaintiff trust company as liquidators demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention.

Held, 1. The defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they ought fairly to be excused under 62 Vict. (2), c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore not honestly and reasonably; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Loan Company, that the whole 575 shares should be retained by the defendant trust company as liquidators, was made without jurisdiction, and did not protect them as trustees.

2. The plaintiffs were entitled to damages for the detention (delivery having been made pending the action) based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery.

Gibbons, K.C., *Shirley Denison* and *W. K. Cameron*, for plaintiffs.
S. H. Blake, K.C., and *W. H. Blake*, K.C., for defendants.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[Dec. 29, 1903.]

GRAHAM v. BOURQUE.

*Chose in action—Assignment of money payable “in respect of the contract”
—Damages for interference with the work—Attachment of debts.*

Held, affirming the decision of STREET, J., 6 O.L.R. 428, that the assignment to the claimants of moneys to become due and payable “in respect of a certain contract” for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque v. City of Ottawa*, 6 O.L.R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor.

Aylesworth, K.C., for judgment creditor. *Middleton*, for claimants.

Meredith, C.J.C.P.]

[Dec. 29, 1903.]

HAYCOCK v. SAPPHIRE CORUNDUM CO.

Mechanics' lien — Action — Parties — Execution creditor — Incumbrance arising pendente lite—Notice of trial—Judgment—Vacating.

Under s. 36 of the Mechanics' and Wage Earners' Lien Act, R.S.O. 1897, c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served; service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.

After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a fi. fa. against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens.

Held, that the name of the petitioners and all reference to their claim should be stricken out of the judgment.

F. E. Hodgins, K.C., for petitioners. *W. H. Blake*, K.C., for plaintiffs.

Meredith, C.J.C.P.]

RE WALSH & FITCH.

[Jan. 2.]

Solicitor and client—Taxation—Delivery of bill of costs—Delivery of amended bill after order.

Some solicitors having delivered an unsigned bill of costs, the client applied for and obtained an order that they do deliver a bill and for taxation of same when delivered. Under this order the solicitor delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged.

Objection was taken on the part of the client that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed.

Held, that by applying for an order for delivery of a bill the client must be considered to have consented to the old bill being withdrawn, and the objection could not prevail.

Hislop, for client. *Middleton*, for solicitors.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[Jan. 4.]

BILLING v. SEMMENS.

Master and servant—Injury to servant—Death—Absence of direct evidence as to cause of injury—Case for jury—Dangerous machinery—Factories Act.

The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of the defendants, which, as she alleged, resulted in his death, and were caused by a defect in the condition or arrangement of a "jointer" at which the deceased was working, the revolving knives of which it was, as she contended, the duty of the defendants under the Factories Act to guard, and which were not so guarded. The plaintiff shewed that the knives of the jointer were a dangerous part of the defendant's machinery; that it was practicable securely to guard them; that they were not securely guarded; that the deceased's injuries were caused by his fingers coming in contact with the knives while they were in motion; and that he was then engaged in trimming, by means of the knives, the edges of a board eight feet long, two inches thick, and from twelve to fourteen inches wide; but it was not shewn by direct evidence exactly how the deceased's fingers came into contact with the knives. It was shewn, however, that almost immediately after the accident the board was found lying on the table of the machine, with "up the centre a split running about half way through it;" that the board "had been run half way over the machine;" and that there was a shaving hanging to it "as if the knives had struck the wood and never cleaned it out—curled up." There was also evidence that the action of the operator in pushing a board over the machine was likely to stop the machine if the bolts were not tight, and that, in the opinion of an expert who had seen the machine in operation, the position of matters immediately after the accident indicated that the machine had stopped owing to the belt not having been tight enough, and that, if this had happened, the board would be likely to "jump" and to cause the operator's fingers to drop from it and to be brought into contact with the knives. There was also evidence that what was spoken of in the evidence as a "fence" was in proper position.

Held, that these circumstances afforded evidence which, if believed, warranted the inference being drawn that the injuries to the deceased happened while he was in the act of putting the board through the jointer, and that, owing to the knives being unguarded, his fingers, without fault of his, came into contact with the revolving knives by which the ends of them were taken off.

Montreal Rolling Mills Co. v. Corcoran, 26 S.C.R. 595, *Canadian Coloured Cotton Co. v. Kervin*, 29 S.C.R. 479, and *Wakelin v. London and South Western R. Co.*, 12 App. Cas. 41, (1896) 1 Q.B. 196 n., distinguished.

Held, also, following *Groves v. Wimborne*, (1898) 2 Q.B. 402, and *Sault Ste. Marie Pulp Co. v. Myers*, 33 S.C.R. 23, that failure to obey the direction of the Factories Act as to guarding dangerous machinery, which results in injury being caused to an employee, gives a right of action.

Nesbitt, K.C., for plaintiff. *Riddell* K.C., for defendants.

Divisional Court.]

IN RE BAILEY.

[Jan. 5.

Will—Construction—Legacies—Payment out of real estate.

A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters and proceeded as follows: "I give to my wife all the moneys that remains after paying my former bequeaths, debts and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living;"

Held, that there has not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville v. Browne* (1859), 7 H.L.C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. Judgment of TEETZEL, J., affirmed.

Watson, K.C., for appellants. *George Wilkie*, for respondents.

Teetzel, J.]

STANDARD TRADING CO. v. SEYBOLD.

[Jan. 9.

Discovery—Examination for—Amended pleadings—Second examination order for—Limitation of.

Where pleadings have been amended raising matters not before suggested, after examination for discovery has been had, an order may be made in a proper case for a further examination which may be limited to the matters raised by the amendment. Judgment of the Master in Chambers affirmed.

D. L. McCarthy, for the appeal. *W. H. Blake*, K.C., contra.

Teetzel, J.] CLEMENS v. TOWN OF BERLIN. [Jan. 21.
*Jury notice—Striking out—Steam roller on highway—Misfeasance by
 defendants—Non-repair—O.J.A. s. 104.*

An action for damages caused by runaway horses which were frightened by a steam roller, left standing on highway, is an action based on an act of misfeasance by the defendants, and not of the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury. Judgment of the Master in Chambers reversed.

Du Vernet, for plaintiff. *C. A. Moss*, for defendants.

Boyd, C., Ferguson, J.] [Jan. 25.

PALMER v. MICHIGAN CENTRAL R. R. CO.
Railway—Farm Crossing—Approaches—Repair.

Judgment of Street, J., reported 6 O.L.R. 90, affirmed.

The accident arose on the plaintiff's own property and from his own default in not remedying the defect in the approach, and in not giving notice to the company that any such defect existed.

Semble, a distinction exists between the approach to an over-head bridge on a public highway, and the approach on private lands to a farm crossing over the line of rail. While the presumption will be, in the case of the former, that the approach is part of the bridge to be kept in repair by the Railway Company, in the case of the latter, in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within his limits.

Tremecar, for plaintiffs. *Hellmuth K.C.*, for defendants.

North-West Territories.

SUPREME COURT.—NORTHERN ALBERTA.

Scott, J.] KING v. LATIMER. [Dec. 30, 1903.
Practice—Judgment by default—Debt—Interest—Setting aside—Rule 90.

In an action for \$108.07 for goods sold and delivered, the plaintiff claimed \$4.66 as interest, but did not shew upon what the claim for interest was founded.

Held, on an application to set aside a judgment, signed in default of appearance under Rule 90, that, in the absence of an allegation in the statement of claim of some contract, expressed or implied, to pay interest, it is an unliquidated demand, and cannot be included in such judgment.

Judgment set aside accordingly.

J. D. Hyndman, for plaintiff. *F. C. Jamieson*, for defendant.

Scott, J.]

KING v. PLANTE.

[Dec. 30, 1903.

Liquor License Ordinance — Imprisonment — Hard labour — Conviction quashed—No power to amend—Magistrates' Ordinance—Interpretation.

The defendant was convicted under section 122 of the Liquor License Ordinance (C.O. 1898, c. 89) for supplying intoxicating liquor to an interdicted person, knowing the said person to be interdicted, and sentenced to pay a fine of \$50 and costs, and in default of payment to imprisonment for a term of two months with hard labour. Section 122 of the Ordinance provides that a person convicted of such an offence shall be liable to a penalty of not less than fifty dollars and not more than two hundred dollars, and in default of payment to not less than two months nor not more than twelve months imprisonment, no provision being made for imposing imprisonment with hard labour.

Held, on an application to quash, that imprisonment does not include imprisonment with hard labour, and in the absence of special provision imprisonment with hard labour cannot be imposed.

Held, also, that, upon application to quash, the Court has no power to amend convictions under a Territorial Ordinance, that the powers of amendment given by sections 883, &c., of the Criminal Code do not apply, the provisions of Part LVIII. being made applicable by the Magistrates' Ordinance (C.O. c. 32, s. 8 and c. 8 of 1900) to proceedings before justices of the peace and to proceedings upon appeal only. Conviction quashed.

C. F. Newell, for prosecutor. *Wilfrid Gariepy*, for defendant.

Province of British Columbia.

SUPREME COURT.

Hunter, C. J.]

HICKEY v. SCIUTTO.

[April 8, 1903.

Landlord and tenant—Lease of premises for hotel—Premises not fulfilling requirements of by-law—Illegal lease.

Action by lessor on covenants for rent and repair. Premises in Vancouver leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was stopped by the authorities from using the premises as an hotel :—

Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio and the maxim, *In pari delicto potior est conditio defendentis*, applied.

Even if the lease were not void ab initio it became void by the action of the authorities in stopping the further use of the premises as an hotel. Judgment for defendant.

L. Bond, for plaintiff. *G. H. Cowan* and *A. J. Kappeler*, for defendant.

Hunter, C. J.] WOODBURY MINES *v.* POYNTZ. [Oct. 13, 1903.
Mining Law—Expiration of certificate—Special certificate—R.S.B.C., 1897, c. 135, s. 9 and B.C. Stat., 1901, c. 35, s. 2.

Action of adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to May 31, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located on July 8, 1901. On Oct. 25, 1901, the plaintiffs, by paying a fee of \$300 obtained a special free miner's certificate in accordance with the provisions of s. 2, c. 35, of stat. of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant.

Held, that on the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner, becomes open to location, and the obtaining of a special certificate under s. 2, of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim. Judgment for defendant.

A.H. MacNeil K.C. for plaintiffs. *McAnn* K.C. and *P.E. Wilson*, for defendant.

Full Court.] JOWETT *v.* WATTS. [Nov. 5, 1903.
County Court Act, ss. 103, 104, 106.—Garnishee summons based on default summons.

Appeal from a judgment of Forin, Co. J., setting aside a garnishee summons which had been issued based on a default summons, holding that it was irregular because the only provision for issuing a garnishee summons was to make it returnable at the same Court as the ordinary summons was returnable and a default summons is not returnable at any fixed Court.

Held, a garnishee summons may be issued based on a default summons as well as on an ordinary summons; the settling of the time of the holding of the Court is only a question of procedure, and if a plaintiff summons a garnishee too soon it will be at the peril of costs. Appeal allowed.

S.S. Taylor, K.C. for appellant. *C.B. Macneill*, for respondent.

Drake, J.] DAVIES, SAYWARD MILL CO. v. BUCHANAN. [Nov. 26, 1903.
Production of documents—Place of—Rules 4 and 5 of Rules of April, 7, 1899.

Summons to produce for inspection certain documents referred to in defendants' affidavits of documents. The plaintiffs and their solicitors lived in Victoria and the writ was issued out of the Victoria Registry. The defendant, Buchanan and his solicitor lived in Kaslo. Notice was given to plaintiffs' solicitors, that the documents might be inspected at Kaslo. Plaintiffs contended that the documents should be produced for inspection in Victoria where the defendants' solicitor had a registered agent.

Held, that all defendants' documents other than the books of account (the production of which in Victoria would be prejudicial to defendant's business operations) should be produced for inspection in Victoria: and that the books of account be produced in Kaslo.

Fell, for plaintiffs. *Barnard*, for defendant.

Full Court.] MILLER v. AVERILL. [Jan. 8.

Specific performance—Contract to accept part payment for services in stock—Failure to deliver stock—Damages.

Appeal from judgment of Leamy, Co. J. Plaintiff contracted with defendant to do certain work at the rate of \$7 per day whereof \$1.50 should be paid in cash and the balance of \$5.50 in stock in a mining company at fifteen cents a share, and after the lapse of over a year plaintiff sued for the cash balance due him for his services, or in the alternative for damages for breach of contract. At the trial, without any evidence as to the present value of the stock, the defendant was ordered to deliver stock at fifteen cents a share in satisfaction of plaintiff's claim.

Held, allowing the appeal, that on defendant's failure to deliver the stock plaintiff was entitled to damages for breach of contract and could not be compelled to accept stock.

W. H. P. Clement, for appellant. *J. H. Lawson, Jr.*, for respondent.

Full Court.] [Jan. 27.

ESQUIMALT WATER WORKS CO. v. CITY OF VICTORIA.

By-law—Illegality—Insensible—Rules of construction.

Appeal from judgment of Drake, J., quashing a by-law on the ground that it was insensible and meaningless.

A by-law having for its object the closing of the Craigflower Road read thus: "That portion of the Craigflower Road by-law No. 327, being the 'Craigflower Road Re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word

"by" was omitted inadvertently from between "Road" and "By-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself.

Held, that the words "By-law No. 327, being the Craigflower re-opening by-law" in the enacting clause should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended.

The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable.

Appeal allowed, Irving, J., dissenting.

W. J. Taylor, K.C., and *Bradburn* for appellants. *A. P. Luxton* and *R. H. Pooley* for respondents.

Book Reviews.

An Epitome of Real Property law for the use of Students. By W. H. HASTINGS KELKE, M.A., Barrister-at-Law. 3rd edition. Sweet & Maxwell, Limited, 3 Chancery Lane, London, 1903. 190 pp.

That this manual has been found to meet the needs of students is evident from its having attained to its third edition in a comparatively few years. As the author says, "It is not intended to supplant any of the larger manuals but to be read along with them." As he also correctly says, "a student who attacks a big law book is apt to be appalled by the multiplicity of detail and the enormous number of cases and statutes." We thus readily see its *raison d'être*.

Rating Forms of grounds of notices of objection and appeal. By W. L. L. BELL, Barrister-at-Law. Sweet & Maxwell, Limited, 3 Chancery Lane, London, 1903. 138 pp.

We, in this country, are surprised to be told that in England, "few things are more difficult to the legal draftsman than the drawing of a notice of objection or appeal against a valuation list or rate." In this portion of the empire nothing is much simpler. It might perhaps be well for the solicitor of the Ontario Municipal Association to look into this matter. Appeals should not be too easy! And besides a change in our practice in this respect might help to supplement waning professional incomes, which are now mercifully aided by the bountiful grist of municipal amendments which pass through the legislative mill of this Province, still further confusing things already worse confounded.

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The complaints of cases delayed and business blocked in the Ontario Courts are increasing in vehemence. Something should be done about it at once. The Government at Ottawa is in disrepute in this matter.

On the 7th of February war was begun between the Japs and the Russ over the question of ascendancy in Korea and Manchuria—a war that the land-greed of Russia made absolutely inevitable. There have been, up to the time of writing, no breaches of the settled rules of the laws of war; but trouble of this sort looms large on the international horizon. Notwithstanding adverse criticism by the French, Japan did not err in law by beginning hostilities without a formal declaration of war. The best modern authorities support this view. The splendid state of readiness and efficiency for the conflict on the part of Japan has caused those who have not followed the wonderful advancement in modernity of that country during the last quarter of a century, to marvel where hitherto they were prepared to doubt. That the Jap has an important part to play in the civilization of the future no thinker will deny. Although small in stature, his physique is that of which the best present day fighting stock is made, and his courage is conceded by all who have tested its mettle. Perhaps the finest qualities in the Japanese character are his freedom from dilettanteism and his faith in himself, the precise qualities in which most of the older civilizations of the world are lacking to-day. Sincerity and strength of purpose marked the conquerors of old, and Carlyle says that the deadliest of all unbeliefs is unbelief in ourselves. Just as the endemic religion, Sintoism, was able to largely assimilate the Buddhism which invaded the country in the sixth century, and just as this people have been able in a single generation to absorb the best features of an alien twentieth century civilization, so, with a like measure of success, we believe, they will force themselves forward to a conspicuous place in the councils of the world powers through the medium of the present war.

In our last issue we discussed at some length the expediency of prompt action being taken by those in authority toward removing all obstacles to the entrance of Newfoundland into the Canadian confederation. We are pleased to find that the views we gave expression to upon this subject have met with the appreciation of several of our subscribers whose judgment we value highly. One of them has been good enough to send us the following extract from a report of the United States Consul at St. Johns which illustrates to a startling degree the attempts that are at present being made by our cousins across the border to "Americanize" the island colony: "American capitalists are among the foremost in developing the wealth of Newfoundland. Of such interests I may mention the York Harbor Copper Mine, the Benoit Chrome Mine, the Valley Island and the Bay Vert Pyrites Mines. The York Harbor deposits are the richest copper beds in the world, and the present owners are spending \$250,000 in their development. In the lumber industry the company, headed by Mr. H. M. Whitney, of Boston, has acquired several large properties in the colony and is operating them on a hitherto unequalled scale. Mr. George J. Barker, of Boston, has also acquired a large grant and is developing it extensively. An American syndicate is now negotiating for forest tracts on the west coast for charcoal manufacture as well as for ordinary lumbering. There is room for the sale of large quantities of American machinery for lumbering and pulp making. Harmsworth, the great London publisher, has secured a large forest area and is arranging for the establishment of a pulp and paper making plant to cost \$2,500,000. The United States practically controls the trade in agricultural machinery, but now, when American capitalists are interesting themselves to such a large extent in the development of the industries of Newfoundland, is a good time for an aggressive campaign by American manufacturers for the general enlargement of their trade in the colony." The lesson for Canadians in the above extract is *res ipsa loquitur*—we shall not waste time in demonstrating the obvious. The project of rounding out Canada by the inclusion of Newfoundland within its boundaries was made the subject of a resolution moved by Lieut.-Colonel Ponton (seconded by Hon. Wm. Ross) and adopted unanimously by the Congress of Chambers of Commerce of the Empire held at Montreal in August last. This endorsement of the project by representatives from all parts of the empire emphasizes it as a matter of great imperial concern.

REPRIEVES IN MURDER CASES.

The writer of the article under this heading (ante p. 54) is indebted to the kindness of Hon. Mr. Justice Osler for a reference to an unreported Ontario case (*Reg. v. Young*), the facts of which yield a counterpart to the Cashel case there discussed.

The prisoners in the former case, uncle and nephew, were, on March 27, 1876, found guilty of the murder, near Caledonia, in the County of Haldimand, of a farmer named MacDonald ; and were sentenced to be hanged on June 21 following, Mr. Justice Morrison being the trial judge. On the evening of Sunday, May 28, through a bold attack upon the jailer, the younger man secured his keys, and the uncle being afterwards released by him, both effected their escape. They continued at large until midsummer, and were only retaken after a stout resistance.

Kenneth McKenzie, Q.C., for the Crown, moved before the full Court (Harrison, C.J., and Morrison, J.,) on August 27, for writs of habeas corpus and certiorari to bring up the prisoners from the jail at Cayuga, and the indictment against them, for the purpose of applying for a new sentence of death ; which, on return, made to the writs, was passed upon them. The nephew, in the end, was respited, and the uncle hanged. M. C. Cameron, Q.C., acted for the prisoners.

It might be pointed out, by the way, that, rather against some of the authorities, the removal of an indictment after judgment pronounced, as well as the grant of a habeas corpus ad subjiciendum, otherwise than at the solicitation of a prisoner, was thus authorized.

The law touching reprieves was in exactly the same position then as it is now, so that it will be seen that the Court's manner of disposing of the earlier case differs from the procedure followed by the Department of Justice in the latter case where the difficulty was sought to be overcome simply by a reprieve. It must be supposed that Hon. Edward Blake, Minister of Justice at that time, would have fallen back upon the reprieve, had recourse thereto been thought defensible. The two proceedings illustrate the difference between untying a knot and cutting it.

In view of what has taken place and of the uncertainty that seems to exist, it might be well for the law officers of the Crown to consider the propriety of an amendment to section 937 of the

Criminal Code, so as to prevent difficulty in the future. It might perhaps be sufficient to strike out the following words at the end of the section: "as are necessary for the consideration of the case by the Crown;" and possibly also to add after the words: "it becomes necessary to delay," the following: "or impossible to carry out;" and also to add after the words, "from time to time," the sentence: "before or after the time fixed therefor." The fact that two cases have already risen which have caused perplexity in this regard, is a sufficient reason for an amendment.

OUR RIGHTS IN HUDSON'S BAY.

The reported despatch by the Dominion Government of an expedition to establish British supremacy in Hudson's Bay, and the territory which surrounds it, may perhaps give rise to some important questions of international law and territorial rights. It therefore behooves us to walk warily, in all matters of that character, and, while firmly standing by unquestionable rights, not to assert claims which cannot be maintained.

Hudson's Bay, which ranks in point of extent with the Black Sea and Baltic, differs from those great inland seas so materially that no common rule of international law is applicable to all. No precedents for our guidance can be found in the solution of the many questions which have arisen with regard to them, nor is there, in any part of the world, a case precisely similar to ours. Our inland sea is peculiar in this—that while the shores that surround it are all in the possession of a single power, which is not the case with either the Black sea or the Baltic, yet the channel by which it is approached, varying in width from one hundred to sixty miles, differs entirely from the narrow passages to those other seas which can be controlled by the Powers occupying them.

By their original character the Hudson's Bay Company were granted the sole right to trade and commerce in all the waters lying within Hudson's Straits, including of course what is known as Hudson's Bay, and that sole right, whatever the validity of the grant may be, undoubtedly passed to Canada by the purchase of the Hudson's Bay territories and all pertaining thereto in the year 1869.

By the treaty of 1818 between Great Britain and the United States, which defined the rights of the Americans to fish off the

coasts of Labrador and Newfoundland, reference was made to the exclusive right of the Hudson's Bay Co. The waters inside of Hudson's Straits are not mentioned in the treaty. The natural inference from this would be that the Americans recognized the existence of those exclusive rights and are debarred from now calling them in question.

The several questions then which must be faced in dealing with this matter are, first: Had the British Government the right to treat the waters of Hudson's Bay as *mare clausum*, and therefore to confer upon the Hudson's Bay Company the sole trade and traffic of Hudson's Bay. If that can be established no further argument is necessary. Again by the treaty of 1818 did not the Americans recognize that right? If so, are they not precluded from now calling in question the sovereignty of Canada in these waters.

Taking the first point into consideration, the nearest approach that we can find to a parallel case is that of Conception Bay in Newfoundland—a sheet of water forty or fifty miles long, and over twenty miles wide at its mouth. In *Direct United States Cable Company v. Anglo-American Telegraph Company* 2 App. Cas. 394 (1877), it was held, on appeal to the Privy Council, that this bay was a British Bay, and a part of the territorial waters of Newfoundland, in opposition to the contention that the bay was part of the open sea, and not *mare clausum*.

In giving judgment Lord Blackburn said, at p. 419, "Passing from the common law of England to the general law of nations, we find a universal agreement that harbours, estuaries and bays land-locked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is a bay for this purpose". Speaking of the test of occupation his lordship says that most writers refer to defensibility from the shore as the test, some suggesting a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore or six miles; some an arbitrary distance of ten miles. All of these rules if adopted would exclude Conception Bay from the territory of Newfoundland, though he goes on to say the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays. He further says: "It does not appear to their Lordships that jurists and text-

writers are agreed as to what are the rules to dimensions and configurations, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination."

The Court, however, held that in this case it was not necessary to lay down a rule, for it seemed to them sufficient ground for their decision "that in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important; and, moreover (which in a British tribunal is conclusive), the British legislature has by Acts of Parliament declared it to be part of the British territory and part of the country made subject to the Legislature of Newfoundland."

In the American case of *Manchester v. Massachusetts*, 139 U.S. 240, Mr. Justice Blatchford giving the judgment of the Supreme Court of the United States said:—"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within the limit;" and that included in this territorial jurisdiction is the right of control over fisheries &c. This also was the rule adopted by the Halifax Commission in 1877, and, as above stated, seems to be the first case cited.

It is obvious, however, that while this rule may be properly applicable to an ordinary coast line there are many cases in which its application would bring about results not in the contemplation of those by whom it has been laid down. It would, for instance, upset the judgment of the Privy Council, in the Conception Bay case. It would oust the British Government from the control which it has always exercised, and will always continue to exercise over the Narrow Seas. It would make open ocean not only of the Gulf of St. Lawrence, but of many miles of the estuary of the river St. Lawrence. It would prevent Russia from controlling the White Sea; and last, but not least in the present contention, would deprive the Government of the United States of their jurisdiction

over Delaware Bay, Chesapeake Bay, and similar waters. As the entrance to Hudson's Bay is about sixty miles in width at the narrowest point, the Bay by this rule would be open sea, and the Government of Canada could exercise no control over it beyond the three mile limit.

Evidently, therefore, there must be some other and wider principle upon which the claim to jurisdiction over land-locked waters by the Power owning the coast surrounding them must be founded than the precise width of the entering channel.

In the Conception Bay case this was found in the undisputed sovereignty exercised for many years by the British Government. In a case arising from the seizure of a ship in Delaware Bay the entrance to which is more than six miles in width, the United States Courts held the seizure to be illegal as the waters of the bay were neutral, the shores on both sides being part of the territory of the United States. Great as is the extent of Hudson's Bay it is as completely a "British Sea" as was the Black Sea a Turkish Sea before the Russians obtained a share in its coasts; and wide as is the channel leading into it, it is in no sense a highway of nations, or a road for commerce, as are the Dardanelles, the straits of Gibraltar, or the Sound leading to the Baltic. It is not so now, and nature forbids it ever becoming so. Closing the Hudson's straits would be no hindrance to commerce, or inconvenience to travel. It would be a matter of as purely domestic concern as would be the closing of the channels leading from Lake Huron to the Georgian Bay. The width of the straits, therefore, no more affects British rights in Hudson's Bay than does the width of the mouth of Chesapeake or Delaware Bays effect the rights which the Government of the United States claims in those by no means land-locked waters.

If upon grounds of public policy so clear as to command general assent a sheet of water such as Hudson's Bay ought to be under the exclusive power of the country possessing its shores, the fact of the width of the inlet would be of no consequence whether it was six miles or sixty. It might be for the public convenience that the Power absolutely controlling the whole coast and three miles of sea outside it—in whose hands would be the lighting, pilotage, harbours, and everything in connection with navigation, and without whose consent no vessel could land or seek for shelter—

should exercise a general control over the whole waters of the inland sea. Certainly it not only seems reasonable that such a right should exist, but also that it should carry with it the right to possess whatever in the shape of property was included within it.

On some such principle the United States contended for the control of Behring Sea, but there the theory was clearly inadmissible, as Russia equally shares with the United States the littoral of that sea.

W. E. O'BRIEN.

THE LAW OF MASTER AND SERVANT.

The law on this subject has advanced greatly since the days when Lord Abinger so merrily flouted the claims of the poor butcher boy against his master on account of injuries received in his service: *Priestly v. Fowler* (1837), 3 M. & W. 1. Public opinion has, by degrees, brought about a change in the judicial interpretation of the Common Law, and the legislature has, by various statutes, come to the relief of injured employees. This branch of the law is now a difficult and complicated one. The relations of capital and labour are always becoming more delicate and more strained; and there is probably no subject on which the practising lawyer is more frequently consulted at the present day than this, and none in which he finds the necessity greater of having a compendium of the law always ready to hand.

It is, therefore, with much pleasure that we draw attention to the monumental work of Mr. Labatt on this subject*; two portly volumes of which, containing 2639 pages, have been published; the third yet to come. The two volumes now ready are, however, complete in themselves, containing a full table of contents, an analytical index and a complete table of cases. The work is in truth more like an encyclopedia of the law on this subject than a commentary such as it modestly professes to be, the statute and case law of all Anglo-Saxon jurisdictions being summed up in it.

* Commentaries on the law of Master and Servant by C. B. Labatt, B.A. (Cantab.), in three volumes: Vols. I and II, Employer's Liability; Vol. III, Relation, Hiring and Discharge, Compensation, Strikes, etc. Canadian Edition. Lawyers' Co-operative Publishing Co., Rochester, N. Y. Canada Law Book Co. Toronto, Canada.

To the Ontario lawyer the publication of this great work will prove an inestimable boon. We have no modern book dealing with our own statute (R.S.O., c. 160). Mr. G. S. Holmsted's treatise on was published in 1893; but many important amendments have been made to the statute since then, and numerous cases interpreting its provisions have come before the courts.

The present English Act of 1897 is materially different from our own, so that modern English text books and cases are likely to mislead the unwary practitioner who consults them. Hence the publication of the present work is very opportune and we can heartily recommend it as a valuable, if not indispensable, addition to the library of the practising lawyer.

The reader is warned by the author that, as a general rule, no cases are cited which are of a later date than those collected in the volumes of the General and American Digests which were published in the spring of 1902. This disarms criticism as to the absence of cases, and may be the reason for the non-appearance of *McHugh v. G.T.R.* (1900) 32 O.R. 234 (a); (1901) 2 O.L.R. 600, upon the effect of the maxim, "actio personalis moritur cum personâ"; and of *Roberts v. Taylor* (1899) 31 O.R. 10, and *Fahey v. Jephcott* (1901) 2 O.L.R. 449, on the effect of disregard of statutory directions. But this hardly explains the absence of any reference to the important case of *Cameron v. Nystrom* (1893) A.C. 308 (b), on the subject of common employment.

While this method of dealing with cases has advantages, it is not one to be imitated, unless the starting point for the reader's independent investigation is brought up much closer to the date of publication of the book than is the case in the present instance, where a book published in 1904 does not, except in regard to the English Workmen's Act of 1897, which is made an exception to the

(a) It may be noted that this case merely illustrates the application of the Fatal Accidents Act. The plaintiff was, as it happened, a servant; but this fact is not perhaps a differentiating element in such a sense that it must be deemed improper to omit the case in a work dealing with the relation of the master and servant. The effect of damage acts of this description is adverted to generally in ss. 716, 844; but the topic as a whole was doubtless regarded by the author as being outside the scope of the treatise.—Ed. C.L.J.

(b) This was an action brought against a person who was not the master of the plaintiff. The reader will find the general rule applicable under such circumstances referred to in ss. 490, 491. In note 2 to that section it is stated that such cases are discussed in the third volume, and the reason for this arrangement is also stated.—Ed. C.L.J.

general scheme, contain cases decided within two or more years prior to the date of publication.

The general plan of the work may be briefly outlined as follows: The text of the treatise is printed in bold and legible type, while the numerous authorities illustrating it are placed in foot notes. These notes contain not merely the names of cases, but very frequently full extracts from the judgments; a very useful feature. The reader, who may have only a limited library, is thus put in possession of the gist of the authorities upon which the author relies. In some instances a vigorous criticism accompanies the citation; see for examples *Webster v. Foley*, 21 S.C.R. 580, at p. 1983, etc., and *Sim v. Dominion Fish Company*, 2 O.L.R. 69, at p. 1975. Reference is made to all the reports, official and otherwise, in which cases may be found.

The first 33 chapters are devoted to a discussion of the general principles (apart from statute) governing the liability of a master for injuries to a servant. The questions as to what degree of care a master is bound to exercise for the protection of his servant, and what kind of instrumentalities he is bound to furnish are carefully considered and the cases bearing on them are fully discussed.

Chapter seven contains an interesting consideration of the moot point as to how far a servant's knowledge or ignorance of the risks involved in the employment affects the master's liability.

The cases on this point are by no means consistent. Mr. Labatt criticises the opposing theories in an instructive manner. The doctrine, "first announced in all its repulsive nakedness by the late Lord Bramwell," that no negligence is predicable of the master where the servant knows and appreciates the risk to which he is exposed, the inevitable conclusion of which is that "as to any servant who understands the conditions and the risks arising therefrom, a master may, without being affected with legal culpability, carry on his business with instrumentalities that are defective and in bad repair, and by methods which are abnormally dangerous," is justly characterised as being economic rather than juristic and as inconsistent with a true conception of public policy, and "repugnant to the unsophisticated mind of the average layman." In a note to sec. 62, p. 156, the author refers to "one of the most amusing instances on record of the inability of some reporters to estimate the comparative importance of decisions."

Mr. Labatt has the courage of his opinions, and is not content to merely balance decisions pro and con, but handles without gloves those which appear to him to be erroneous, and discusses in an instructing and interesting manner the different view points which the courts have adopted, whether economic or juristic. This not only adds to the interest but also to the value of the work for the practitioner. When conflicting cases are marshalled and discussed in the able method found in the present work, the task of a counsel attempting to prepare a brief, is very considerably lightened. The discussion appended to this chapter (VII) is an excellent illustration of the author's mode of treatment.

In the subsequent chapters the master's duties towards his servants are taken up, the duty in regard to employment, to the system of conducting the business, to instruct and warn the servant are carefully dealt with. The doctrines of contributory negligence and of *volenti non fit injuria* are exhaustively considered.

The defence of Common Employment claims several chapters. In short there is no aspect of the servant's rights and the master's liabilities (apart from the statute) which is not fully and logically dealt with. It seems impossible to suggest a more complete treatment of the subject than has been carried out here with admirable skill.

Chapters 34 to 41 deal with the statutes on the subject of the liabilities of employers which have been enacted in the various countries in which the common law forms the basis of jurisprudence, including the English Act of 1897. We thus have, what is both unique and interesting, a collection of all statutes passed on this subject in the English speaking world. The cases decided in regard to these statutes are fully collected and analyzed; as far as the writer has been able to make a test, this part of the work seems to have been carefully and accurately attended to.

Next come chapters dealing with "Causation," "Evidence," "Parties," "Pleading and Practice," "Conflict of Laws," and "Employers' Liability under the Civil Law and systems founded thereon"; in the latter special prominence being given to decisions in the Province of Quebec.

Writing from the point of view merely of an Ontario practitioner we venture to suggest that Canada and its Provinces should not merge their individuality in the index (which by the

way is not the work of the author) and are just as much entitled to be referred to by their names in the index as Dakota, Utah, etc., to which are given a "local habitation and a name." To find the Ontario statute reference must be had to the general heading of "Statutory Liability" (p. 2532); there under the sub-head of "English Employers' Liability Act of 1880, and the American, Canadian, and Australian Statutes modelled thereon" (p. 2533), we find a reference to "Ontario and the other Canadian Provinces." If the third volume is to be accompanied by an index covering the whole work, this defect might be cured. It is to be observed also that only fifteen sections of the Ontario Act, the most important ones to be sure, are given; the remaining sections are omitted as dealing "merely with details of local practice." It is no doubt for a similar reason that the statute 62 Vict. (2) c. 18, which permits claims for compensation to be tried by arbitration has been omitted.

No doubt both of these omissions are justified by the necessity for having some limit to the size of the work.

In any general index it would be an advantage to have a reference to the Fatal Accidents Act, and to the maxim *actio personalis moritur cum personâ*. We draw attention to these slight defects not in any carping spirit, nor with any desire to detract from the great excellence of the treatise, but in the hopes that a way may be found in the third volume to remove them.

Volume III. is to treat of Relation, Hiring and Discharge, Compensation, Strikes, etc. We look forward with interest to the completion of the work.

The bare outline above given of the contents of these volumes shews how complete and exhaustive the treatise will be, and justifies the statement that the name of Encyclopedia would not have been inappropriate. This work may well be classed as one of the great law books of the day; and though we may in a sense claim it as a Canadian contribution to legal literature, inasmuch as Mr. Labatt at present resides here, it is not confined in its usefulness to any one country. It covers the whole field of law, affecting the rights and liabilities of Master and Servant in all countries, the legal systems of which have been founded on the common law of England.

N. W. HOYLES.

SLAUGHTER OF THE INNOCENTS.

The cult of so-called Christian Science (though where either Christianity or science comes in, we fail to see) has been receiving free advertisement of a very malodorous character. As well in Canada as in England and the United States it has come to the front as a sect which, as the result of some of its teachings, is occasionally almost as destructive to the child life of its votaries as was that of the worshippers of Moloch in old time.

In each of the above countries the courts have had to deal with charges of manslaughter arising from the refusal of parents of this ilk to provide necessary medical treatment for their helpless children. In England in the case of *Reg. v. Senior* (1899) 1 Q.B. 283, (which dealt with one of the "Peculiar People" who hold views similar in many respects to the Christian Scientists); in Ontario, in *Rex v. Lewis*, 6 O.L.R. 132; and in the United States, in the case of *People v. Pierson*, recently decided by the New York Court of Appeals.

As our readers have access to the reports of the first two cases we need not take space to refer to them, except to say that the statutory law affecting the matter in England and in Canada is not as comprehensive or as full as in the State of New York. In the case decided there, the prisoner was tried, convicted and sentenced to a fine of \$500 or 500 days imprisonment, for an offence which most parents would consider not far removed from the crime of murder. The conviction was based on a statute which makes it criminal to omit, without lawful excuse, the furnishing of food, clothing, shelter, or medical attendance to a minor. This conviction was sustained by the Court of Appeals. It appears that the prisoner persistently refused to call in a physician or to furnish or administer medicine for an adopted daughter who was suffering from pneumonia. He simply sat by the pain-tortured child and engaged in what he called prayer to, and communion with, the Almighty, without exercising the common sense and common humanity that the Almighty had given him, and deliberately sat there and saw the child die.

The American Court had no difficulties to contend with such as presented themselves in *Rex v. Lewis*, as to whether medical treatment was included in "necessaries," or whether, as in *Reg. v. Senior*, there was "neglect." The general result, however, was the

same, and the law as well as the common sense of the matter was expressed in very similar language in both cases.

In *Rex v. Lewis* Mr. Justice Osler in his judgment makes the following remarks: "Persons sui juris may by mutual consent, and within certain limits, practice upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results. But it would be shocking if, in the case of infants or others incapable of protecting themselves, they and the community in which they lived were to be exposed to danger from contagious or infectious diseases which the instructed common sense of mankind in general does not as yet find or admit to be curable by means only of subjective or mental treatment."

Judge Haight in delivering judgment in the New York Court of Appeals expressed himself as follows: "The law of nature as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance, if necessary, and an omission to do this is a public wrong which the State, under its police powers, may prevent."

A writer in the *Law Notes* commenting on the above judgment pithily discusses the doings of this sect in these words: "They may go their way and practice these beliefs upon themselves and among themselves to their hearts' content. They may pray over a cancer, or work themselves up to the belief that appendicitis is not 'real,' and the law leaves them to what ordinary mortals believe to be their folly. The law simply says that helpless children shall not be immolated upon the altar of the faddists, or condemned to a life of suffering. A religious or a pretended religious belief offers no more excuse for neglecting a child than it does for the practice of polygamy."

ENGLISH CASES.

*EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.*

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—FORFEITURE CLAUSE—ALIENATE OR INCUMBER—PETITION IN BANKRUPTCY BY LIFE TENANT.

In re Cotgrave Mynors v. Cotgrave (1903), 2 Ch. 705. The point for adjudication was whether the presentation of a petition in bankruptcy by a tenant for life under which he was adjudicated bankrupt had worked a forfeiture of his life estate, which was, under a will, subject to a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber," his interest. Kekewich, J., following *Re Amherst*, L.R. 13 Eq. 464, decided that it had, because the petition had been followed by adjudication, which distinguished the case from *Re Lovell* (1901), 2 K.B. 16, 22, where Wright, J., held that the mere presentation of a petition in bankruptcy was not of itself an alienation.

TRUSTEE—APPOINTMENT OF NEW TRUSTEES—DONEE OF POWER TO APPOINT TRUSTEE APPOINTING HIMSELF—VALIDITY OF APPOINTMENT.

Montefiore v. Guedalla (1903), 2 Ch. 723, was an application to the Court by the executors of a will containing a power to the executors to appoint a new trustee of the testator's trust estate, for authority to appoint one of themselves and two others as new trustees in place of the deceased trustees. Buckley, J., held that where there is nothing in the power to indicate that some person other than the donees of the power is to be appointed, there is no rule of law preventing the court sanctioning the appointment of one of the donees, although it is an exercise of the power which should be resorted to only in special circumstances. He considered the circumstances of the present case such as to warrant the appointment, which he accordingly sanctioned.

EQUITABLE EXECUTION—RECEIVER—FUND IN COURT—FUND IN EXECUTOR'S HANDS—NOTICE OF RECEIVERSHIP ORDER—SUBSEQUENT MORTGAGEES AND JUDGMENT CREDITORS—STOP ORDER—PRIORITY.

In re Anglesey, De Galve v. Gardner (1903), 2 Ch. 727. A judgment creditor of a person entitled to an unascertained share of a fund, partly in court and partly in the hands of executors, obtained the appointment, by way of equitable execution, of a receiver of the debtor's share, of which notice was given to the executors. No stop order or charging order was obtained against the debtor's interest in the fund by this creditor. Subsequently the debtor mortgaged his interest in the fund, and other creditors recovered judgments against him and obtained a stop order and charging order against the debtor's interest in the fund. The Master in reporting on the claims of the creditors and mortgagees found that the creditor who had obtained the appointment of the receiver was entitled to priority over the subsequent mortgagees and creditors who had obtained the stop order and charging order. Eady, J., on appeal from the Master's report, affirmed his ruling, holding that although a receivership order does not constitute a creditor obtaining it a secured creditor or give him any specific charge or lien on the fund, yet it operates as an injunction against the debtor receiving it and prevents him dealing with it to the prejudice of the judgment creditor who has obtained the appointment of the receiver, and prevents any subsequent assignee or creditor from gaining priority over the creditor obtaining the order if at the date when the order is made the fund cannot be taken in execution by any other legal process. A charging order, he holds, is like a garnishee order, subject to the prior equities affecting the fund.

PRACTICE—ORDER—REVIEW—APPEAL—ERROR IN LAW ON FACE OF ORDER—ACTION TO REVIEW—JURISDICTION OF HIGH COURT TO REVIEW.

Bright v. Sellar (1904) 1 K.B. 6, deals with a nice little point of practice. The action was brought to review a charging order made in an action of *Sellar v. Bright & Co.*, on 20th December, 1901, purporting to create a charge on certain shares therein mentioned and also on a sum of £623 8s. 9d. cash. No appeal was brought from the order, and the present action was brought by the liquidator of Bright & Co. to review the order on the ground that it was erroneous on its face in so far as it purported to create

a charge on the sum of £623 8s. 9d. cash. The defendant pleaded that no cause of action was disclosed. Wright, J., gave effect to that contention, and dismissed the action. The Court of Appeal (Collins, M.R., and Mathew, and Cozens-Hardy, L.JJ.) affirmed his decision, and in doing so, enter into an interesting discussion of the practice of review under the former Chancery practice, and come to the conclusion that an action of review will not lie where under the practice an appeal could have been had. That in short, the procedure by review is limited to cases where by reason of the subsequent discovery of fraud or of some new matter affecting the order complained of, the order is impeached.

**LANDLORD AND TENANT—COVENANT TO PAY OUTGOINGS—YEARLY TENANCY
—DEFECTIVE DRAIN—RECONSTRUCTION OF DRAIN—TENANT OVERHOLDING
—IMPLIED AGREEMENT BY TENANT HOLDING OVER.**

Harris v. Hickman (1904) 1 K.B. 13, was an action by a landlord against a tenant on a covenant of the latter to pay all "rates, taxes and assessments and outgoings whatsoever in respect of the said premises." It appeared that the defendant had been lessee of the premises under a lease for three years at a rent of £70 in which the covenant sued on was contained, and after the expiration of the three years he continued in occupation of the premises without any fresh agreement and paid rent at the rate reserved by the lease. During this occupation the lessors were served with notice under the Public Health Act that the drain of the premises was creating a public nuisance. The lessors gave the defendant notice to repair it, and on his refusing to do so, they reconstructed it, and now sued the defendant for £70 1s. 6d. the expense of so doing. Wright, J., who tried the action, dismissed it on two grounds, (1) that the lessors having done the work immediately on receipt of the notice of the nuisance and before the receipt of any notice requiring them to abate it, the expense incurred was voluntary and consequently not an "outgoing" within the meaning of the covenant; and (2) because even if it were an outgoing within the meaning of the covenant, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, and that the defendant in holding over, could not be presumed to have become a yearly tenant on the terms of such an obligation. The action consequently failed.

MARRIED WOMAN — CONTRACT BY — MARRIED WOMEN'S PROPERTY ACT
—(R.S.O. c. 163, ss. 4, 21) — JUDGMENT AGAINST WIDOW FOR DEBT CONTRACTED DURING MARRIAGE—SEPARATE PROPERTY—RESTRAINT AGAINST ANTICIPATION.

Brown v. Dimbleby (1904) 1 K.B. 28, very aptly illustrates the anomalous condition of the law under the present Married Woman's Property Act (R.S.O. 163). The Act it may be remembered while apparently giving women power to bind all their property present or future, by their contracts, contains however a reservation of property subject to a restraint against anticipation, which restraint, by the way, on the principle on which the Married Women's Property Act is based, is now a manifest anachronism, and, as this case demonstrates, a means merely of giving married women a fictitious credit which they ought not to have. The debt sued for in the present case was contracted by the defendant when she was a feme covert, she then had separate property which however was subject to a restraint against anticipation; at the time judgment was recovered she was a widow and the restraint, of course, had ceased to be operative. The plaintiff applied for a receiver of the defendant's interest in this property by way of equitable execution, but Walton, J., refused the application, and the Court of Appeal (Collins M.R. and Mathew, and Cozens-Hardy, L.JJ.) upheld his decision on the ground that the property in question was not bound by the contract at the time it was made (see R.S.O. c. 163, s. 21) and could not become so by reason of the restraint against anticipation subsequently ceasing to be operative; *Barnett v. Howard* (1900) 2 Q.B. 784 (noted ante vol. 37, p. 151), being held to be applicable notwithstanding the subsequent amendment made in England by the Act of 1893 (56 & 57 Vict. c. 63, s. 1) from which R.S.O. c. 163, s. 4, was derived.

MARRIED WOMAN—ANTE NUPTIAL DEBT—SETTLEMENT—RESTRAINT AGAINST ANTICIPATION—SEPARATE PROPERTY—MARRIED WOMAN'S PROPERTY ACT
1882 (45 & 46 VICT., c. 75) s. 19—R.S.O. c. 163, s. 21.)

Birmingham Excelsior Society v. Lane (1904) 1 K.B. 35, is another case which illustrates the effect of the restraint against anticipation as a means for defeating the recovery of debts against a married woman. In this case a feme sole contracted a debt and subsequently married, and then separated from her husband, who covenanted to pay her an annual sum subject to a restraint

against anticipation. The creditor recovered judgment against the defendant "to be payable out of her separate property whether subject to any restriction against anticipation or not, and not otherwise," and Ridley, J., granted by way of equitable execution a receiver of the moneys payable under the covenant. The defendant appealed both as to the form of the judgment, and the appointment of the receiver, and the appeal was sustained, the Court of Appeal (Mathew and Cozens-Hardy, L.JJ.) holding that the judgment should have followed the form settled in *Scott v. Morley* (1887) 2 Q.B.D. 120, and that the covenant was obviously not within the words "settlement or agreement for a settlement of a woman's own property to be made or entered into by herself" and therefore was effectual to protect the moneys payable under the covenant from the claims of creditors of the wife. It is worth while noting the remarks of the Court on *Robinson v. Lynes* (1894) 2 Q.B. 577 (noted ante vol. 30, p. 679) from which the plaintiff inferred that the judgment against a married woman for an ante-nuptial debt should be in the form in which it had been entered in this case; Cozens-Hardy, L.J., however, says that case does not touch the question what property can be made available by way of execution on a judgment for an ante-nuptial debt.

**INSURANCE — VOYAGE POLICY — CONSTRUCTION — TIME — COMPUTATION —
"DAYS" HOW TO BE RECKONED.**

In *Cornfoot v. Royal Exchange Assurance Corporation* (1904) 1 K.B. 40, the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) have affirmed the decision of Bigham, J. (1903) 2 K.B. 363 (noted ante vol. 39, p. 711). The short point was as to how a clause in a policy of insurance providing for the termination of the risk was to be construed. The clause in question provided that the insurance was to be for a voyage "and for 30 days in port after arrival." The ship arrived at her port at 11.30 a.m. on August 2, and Bigham, J., held that the thirty days were thirty periods of 24 hours to be computed from the hour of arrival, and the Court of Appeal agreed that this was correct.

**RESTRAINT OF TRADE—COVENANT IN RESTRAINT OF TRADE—REASONABLE-
NESS OF RESTRAINT—QUESTION OF LAW OR FACT.**

Dowden v. Pook (1904) 2 K.B. 45, was an action brought to enforce a covenant in restraint of trade. The case was tried by Grantham, J., who left it to the jury to say whether the restrain

was wider than was necessary for the protection of the covantee and they found that it was. On subsequent consideration he came to the conclusion that the question of the reasonableness of the restraint was one for the judge and not for the jury, and he held that the restraint in question was reasonable, and gave the plaintiff an injunction as prayed. The defendant then moved for judgment in his favour, or for a new trial, contending that the judge had erred in his ruling of reasonableness, but the Court of Appeal (Collins, M.R. and Mathew and Cozens-Hardy, L.JJ.) affirmed his decision that the question was for the Court and not for the jury. As Cozens-Hardy, L.J., neatly puts it, "The question is really one of public policy, which is not a question of fact for a jury, but of law for a judge." The restraint in question, however, prohibited the defendant from carrying on business in any part of the world. The business in respect of which the covenant was given being a cider business carried on mainly in the particular locality in which the defendant was employed to act as manager. Under these circumstances the Court of Appeal held that the restraint was too wide, and on that ground reversed the decision of Grantham, J., and gave judgment for the defendant.

MUNICIPAL ELECTION—ELECTION—NOMINATION AND ELECTION OF DISQUALIFIED PERSON—NOTICE OF DISQUALIFICATION—RIGHT TO SEAT.

In *Hobbs v. Morey* (1904) 2 K.B. 74, the Divisional Court (Kennedy and Darling, JJ.) have laid down a reasonable rule on a point of municipal election law. At the election in question two candidates were nominated. One of them who was disqualified by reason of being interested in a contract with the corporation, was elected. The fact that he was disqualified was unknown to the electors. The other candidate claimed the seat: but the Divisional Court held that although where a candidate is nominated who is known to be disqualified, his opponent who receives the fewer votes is nevertheless entitled to the seat; yet where the disqualification of the candidate is not known to the electors the case is different, and in the latter case there must be a new election.

HUSBAND AND WIFE—MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—SPES SUCCESSIONIS—AMOUNT OF INDEMNITY.

In *re Simpson, Simpson v. Simpson* (1904) 1 Ch. 1, was an application by originating summons to determine whether certain property to which a wife had become entitled on the death of her

husband came within the terms of a covenant to settle after acquired contained in her marriage settlement. The deceased husband was a domiciled Scotsman, and on their marriage the settlement was made and the wife covenanted that if she should during the coverture acquire "any estate or interest in personal property," beyond a certain amount it should be settled upon the trusts declared by the settlement. After the marriage the parties separated, and a separation deed was executed by the husband, and by this deed he covenanted that on his death his wife's right in his estate should not be less than she would have been entitled to if he died a domiciled Scotsman, notwithstanding he may have been domiciled at the time of his death elsewhere. By the law of Scotland known as the *jus relictæ* a right vests in a widow on the death of her husband, if there are children surviving, to one-third of his personal estate, a right which cannot be prejudiced by any will or mortis causa deed made by the husband, but which can be defeated by alienation of his personal estate in his lifetime and it is therefore until death a bare *spes successionis*. It was contended by the executors of the deceased husband that this right being fortified by the covenant of indemnity above mentioned was "property" within the meaning of the covenant and Buckley, J., so held, but the Court of Appeal (Williams, Romer and Stirling, L.JJ.) reversed his decision.

COMPANY — ARTICLES — QUORUM OF DIRECTORS — INTERESTED DIRECTOR — RESOLUTION.

In re Greymouth P.E. Ry., Yuill v. Greymouth P.E. Ry. (1904) 1 Ch. 32, the articles of a limited company provided that any director might enter into, or be interested in a contract with the company, but that no director should vote on any matter relating to any contract or business with the company in which he was interested; and that two directors should be a quorum of directors for the transaction of business. A resolution was passed at a meeting of three directors, two of whom were interested in the subject matter of the resolution; and it was held by Farwell, J., that it was invalid, that a *quorum* meant a quorum competent to vote.

SPECIFIC PERFORMANCE — VENDOR AND PURCHASER — DEFAULT BY PURCHASER AFTER JUDGMENT FOR SPECIFIC PERFORMANCE — COSTS.

In *Olde v. Olde* (1904) 1 Ch. 35, an action was brought by a vendor for specific performance and judgment had been pronounced appointing a day for payment of the purchase money and the

defendant had made default, and the plaintiff then moved to rescind the contract and to stay all proceedings except the recovery of the costs of the action. In *Jeffery v. Stewart* (1899) 80 L.T. 17, North, J., had declined to make the exception as to the costs, but Farwell, J., held that it was proper, following the form of order pronounced by Byrne, J., in *Westerman v. Pantlin*, noted in Seton, 6th ed., vol. 3, p. 2289.

We are all aware of the rapid development of our Canadian North-West. Until a very recent period, the only evidence, though it was a good one, of British law and order, was our most efficient Mounted Police. To-day it, that vast territory has its judiciary, its Bar and its Law Society. The summary of proceedings of this Society at its convocation recently held at Calgary, is a striking illustration of the development spoken of. Nine law libraries have been established in the Territory and many thousands of dollars have been expended in law books. At the meetings spoken of various amendments to the rules and regulations of the Society were passed ; matters of discipline were considered, and a number of new members enrolled. That the Benchers consider the privilege of enrolment as a student of law is of some value, is evidenced by the fact the fee payable therefore is \$400. The President for the ensuing year is N. D. Beck, K.C., of Edmonton ; the Secretary-Treasurer is C. H. Bell, of Regina.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.]

LANGELIER v. CHARLEBOIS.

[Oct. 20, 1903.]

Ownership—Lease—Sheriff's sale—Title to land—Insurable interest—Fire Insurance—Trust—Beneficiary—Principal and agent—Fraudulent contrivances.

C. sr. leased the Academy of Music at Quebec to his son C. jr., for the term of nine years at a rental of \$700 per annum, and as the building was in great want of repair, it was agreed that the rent should be paid for in making the necessary repairs and improvements. In May, 1899, C. jr. had commenced the repairs and improvements and requested C. sr. to obtain insurance against fire for the protection of his workmen, and the expenses then being incurred, C. sr. effected an insurance in his own name, in trust, afterwards declaring to the insurance company that the trust was in favour of C. jr., the real beneficiary intended to be insured, and the premiums were paid to the company directly by C. jr. Subsequently C. sr. became financially involved and the theatre building was sold in execution, C. jr. becoming purchaser and obtained the title to the property under the sheriff's deed. C. jr. then applied to the same insurance company for further insurance on the property, and in issuing the new policy, the company recognized the validity of the first insurance still subsisting in his favour. The building was destroyed by fire in March, 1900, and C. jr. filed claims for the amount of the policies. At this latter date L. had become a judgment creditor of C. sr. and caused an attachment by garnishment to issue attaching the moneys due under the first policy in the possession of the insurance company. An intervention was filed by C. jr. claiming the amount due under the policy and the company with its declaration as garnishee referred to the declaration of trust and deposited the funds to be disposed of as the Court might direct. The policy had never been formally assigned to the son, but the insurance company admitted that he was considered to be the person thereby insured. The execution creditor contested the intervention and contended that the policy enured solely to the benefit of C. sr., notwithstanding the declaration of trust, and that the moneys were subject to attachment by his creditors. The trial Court, Charland, J., maintained the contestation and declared the attachment binding on the ground that the transactions between the father and the son, at the time the insolvency of the former was

imminent, must be reputed to have been made in fraud of creditors and that the declaration of trust could not effect a transfer of the policy. This judgment was reversed by the Court of King's Bench, which, on a different appreciation of the evidence, decided that there had been no proof to raise a presumption of fraud and that the intervenant was the true beneficiary under the policy and in the circumstances of the case.

Held, affirming the judgment appealed from, that under the circumstances, the mere relationship of the father and the son did not give rise to a presumption of fraud in the transactions between them; that the purchase of the property leased by the lessee at the sheriff's sale put an end to the lease by vesting the title to the fee in the lessee, and at the time of the loss by fire, the execution debtor had no insurable interest in the property; that during the whole of the time that the policy of insurance in question was in force, the intervenant had an insurable interest in the property, first, as the lessee thereof, and afterwards as owner in fee, and that he alone was entitled to the moneys payable under the policy of insurance. Appeal dismissed with costs.

Beaudain, K.C., and *Gouin*, K.C., for appellants. *Brodeur*, K.C., and *Pelletier*, for respondent.

Que.]

HILL v. HILL.

[Oct. 20, 1903.

Action for account—Partition of estate—Requete civile—Amendment of pleadings—Supreme Court Act, s. 63—Order nunc pro tunc—Final or interlocutory judgment—Form of petition in revocation—Res judicata.

On a reference to amend certain accounts already taken, a judgment rendered Sept. 30, 1901, adjudicated on matters in issue between the parties and, on the accountant's report, homologated 25th October, 1901, judgment was ordered to be entered against the appellant for \$26,316, on January 30, 1902. The appellant filed a requete civile to revoke the latter judgments within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of *res judicata* as to the matters in dispute and was a final judgment *inter partes*.

Held, that whether the first judgment was final or merely interlocutory the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based, that it came in time as it had been filed within six months of the rendering of the said last judgment and that it virtually raised anew all the issues relating to the taking of the accounts affected by the two former judgments. A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of Sept. 30, 1901, had been refused in the court below and was renewed on the appeal to the Supreme Court of Canada.

Held, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first judgment, the case was a proper one for the exercise of the discretion allowed by s. 63 of the Supreme Court Act and that the amendment to the conclusions of the petition should be permitted nunc pro tunc. Appeal allowed with costs.

Casgrain, K.C., and *MacLennan*, K.C., for appellants. *Beique*, K.C., and *Lighthall*, for respondents.

Que.]

MELOCHE. v. DEGUIRE.

[Oct. 26, 1903.

Conveyance of land—Description of property sold—Partition—Petition action—"Quebec Act, 1774"—Introduction of English criminal law—Champerty—Maintenance—Affinity and consanguinity—Parties interested in litigation—Litigious rights—Pacte de quota litis—Contract—Illegal consideration—Specific performance—Retrait successoral.

The heirs of M. induced several persons related to them either by consanguinity or by affinity to assist them as plaintiffs in the prosecution of a law-suit for the recovery of lands belonging to the succession of an ancestor and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the mis en cause, entered into the agreement sued on by which said plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the law-suit. In an action au petitoire et en partage by the parties who furnished such funds, for specific performance of this agreement ;

Held, reversing the judgment appealed from Davies J. dissenting, that the agreement could not be forced as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favor the conveyance had been made, might have entitled them to maintain the suit without remuneration as the price of the assistance.

2. That there could be no objection to the demande au petitoire being joined in the action for specific performance.

3. The defence of retrait de droits litigieux could not avail in favor of the defendants as it is an exception which can be set up only by the debtor of the litigious right in question. *Powell v. Watters*, 28 S.C.R. 133 referred to.

4. That as the conveyance affected a specific share of an immoveable the exception of retrait successoral could not be set up under art. 710 C.C. *Baxter v. Phillips*, 23 S.C.R. 317 and *Leclerc v. Beaudry* 10 L.C. Jur. 20 referred to. Moreover, in the present case, the controversy does not relate to the succession and, in any event, the assignor cannot exercise the droit de retrait successoral.

Semble, however, that the retention of a fractional interest in the property might have the effect of preserving the right to retrait successoral.

5. That the laws relating to champerty were introduced into Lower Canada by the "Quebec Act, 1774," as part of the criminal law of England and as a law of public order the principles of which and the reason for which apply as well to the Province of Quebec as to England and the other provinces of the Dominion of Canada. *Price v. Mercier*, 18 S.C.R. 303, referred to. Appeal allowed with costs.

Beaudin, K.C., and *Martin*, K.C., for appellants. *Beique*, K.C., and *Robertson*, for respondents.

Que.]

PAGNUELLO v. CHOQUETTE.

[Nov. 10, 1903.

Vendor and purchaser—Misrepresentation—Fraud—Error—Rescission of contract—Sale or exchange—Dation en payment—Improvements on property given in exchange—Option of party aggrieved—Action to rescind—Actio quantum minoris—Latent defects—Damages—Warranty.

An action will lie against the vendor to set aside the sale of real estate and to recover the purchase price on the ground of error and of latent defects, even in the absence of fraud.

In such a case the purchaser alone has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price paid ; he cannot be forced to content himself with the action quantum minoris and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warrant, a building constructed by himself he must be presumed to have been aware of any latent defects and in that respect, to have acted in bad faith and fraudulently in making the sale. The vendor, defendant, represented that a block of buildings which he sold to the plaintiff, had been constructed by him of solid stone and brick and so described them in documents relating to the sale. The walls subsequently began to crack and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased with stone and brick in a manner to deceive the purchaser.

Held, that the contract was vitiated on account of error and fraud and should be set aside, and that, as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages.

Held, further, that the action quantum minoris and for damages does not apply to cases where contracts are voidable on the grounds of error or fraud, but only to cases of warranty against latent defects if the purchaser so elects ; the only recourse in cases of error and fraud being by rescission under art. 1000 of the Civil Code.

In the present case, the sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the

defendant was in possession of the lots he erected buildings upon them with his own materials.

Held, that even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in articles 417, 418, 1526 and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances.

The judgment appealed from was reversed. Appeal allowed with costs. *Duclos*, K.C., for appellants. *St. Louis*, K.C., for respondents.

Que.] G.T.R. Co. v. MILLER. [Nov. 10, 1903.

Railways—Negligence—Braking apparatus—Railway Act (1888), s. 243—Sand valves—Notice of defects in machinery—Provident society—Contract indemnifying employer—Indemnity and satisfaction—Lord Campbell's Act—Art. 1056 C. C.—Right of action.

The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheels required by s. 243 of the Railway Act of 1888.

Failure to remedy defects in the sand-valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence and such a contract is a good answer to an action under article 1056 of the Civil Code of Lower Canada. *The Queen v. Grenier*, 30 S.C.R. 42, followed.

GIROUARD, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees.

Judgment of King's Bench, Q.R. 12 K.B. 1, affirming judgment in review, Q.R. 21 S.C. 346, reversed. Appeal allowed with costs.

Lafleur, K.C., and *Beckett*, for appellants. *R. C. Smith*, K.C., and *Montgomery*, for respondents.

Que.] WINTERER v. DAVIDSON. [Dec. 9, 1903.

Appeal—Amount in dispute—Future rights.

In an action en separation de corps, the decree granted separation and ordered the husband to pay \$1,500 per year alimony. It was paid for some years and the husband having died his widow brought suit to enforce

payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour she sought to appeal to the Supreme Court of Canada.

Held, that as she was only entitled to one year's alimony when the suit was commenced the appeal would not lie notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than \$3,000. The amount demanded establishes the right to appeal and if that is less than \$2,000 it will not lie though more than \$2,000 may be recovered.

Held, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance. Appeal quashed with costs.

Lafleur, K.C., for motion to quash. *Hibbard*, contra.

Que.] CITY OF MONTREAL *v.* LAND & LOAN CO. [Dec. 9, 1903.
Appeal—Amount in dispute—Assessment—Title to land.

In proceedings by the City of Montreal to collect the amount assessed on defendant's land an opposition to the seizure alleging that the claim was prescribed was maintained and the city sought to appeal to the Supreme Court.

Held, that there was nothing in controversy between the parties but the amount assessed on defendants' land and that being less than \$2,000 the Court had no jurisdiction to entertain the appeal. Appeal quashed with costs.

Elliott, for motion to quash. *Atwater*, K.C., contra.

Province of Ontario.

COURT OF APPEAL.

Full Court] CANADIAN OIL FIELDS *v.* TOWN OF ENNISKILLEN. [Jan. 25.
Assessment Act—Piping—Scrap iron—Land of companies.

Held, that the provisions of section 18 of the Assessment Act as amended by 2 Edw. VII, c. 31, s. 1, relating to the assessment of the land of certain companies, only applies to companies of the specific description therein mentioned, and therefor do not apply to such a company as the Canadian Oil Fields Limited, carrying on the business of procuring and transmitting crude petroleum.

Shepley, K.C. for Company. *Hellmuth*, K.C. for Township.

HIGH COURT OF JUSTICE.

Cartwright—Master.]

A. v. B.

[Dec. 29, 1902

Particulars—In action for seduction—Before defence filed—Cross-examination on affidavit denying plaintiff's allegations.

In an action for seduction where the defendant denied upon affidavit the plaintiff's allegations, an order for particulars to be given by the plaintiff was made before the defence was filed.

Knight v. Engle (1889) 61 L.T.R. 780, followed.

Such affidavit being filed as an evidence of good faith only and it not being the duty of the Court to determine on the motion the truth of the facts deposed to an enlargement of the motion for cross-examination was refused.

Middleton, for the motion. *T. J. Blain*, contra.

Teetzel, J.]

[Jan. 29.

RE ARBITRATION BETWEEN TOWNSHIP OF WATERLOO AND TOWN OF BERLIN.

Municipal corporations—Extension of sewers from one municipality to another—Acquisition of necessary land—Arbitration or agreement—Conditions precedent—Uncertainty—"Terms and Conditions" as between municipalities—Reference back.

Arbitrators appointed to determine under s. 555 of the Municipal Act 1903, 3 Edw. VII, c. 19 (o), the terms and conditions upon which the extension of sewers of a town into an adjacent township should be made and whether such extension should be permitted, awarded as follows:—

"That the said town of B. may enter upon take and use any land in the adjacent or contiguous municipality of the said township of W. in any way necessary or convenient for the purpose of providing an outlet for the main outfall sewer of B. and for extending the main outfall sewer of B. into or through the Township of W. and for the purpose of establishing works or basins for the interception or purification for sewer in said township and for making all necessary connections therewith but subject always to the compensation to persons who may suffer injury therefrom."

Held, that the acquisition of lands in the adjoining township is not a condition precedent to the arbitration but that the arbitration or agreement between the municipalities as to terms and conditions is a condition precedent to the dominant municipality exercising the power of expropriation of private property in the servient municipality: But

Held, that the authority of the arbitrators under section 555 to pass upon the extension of a sewer into the territory of another municipality and also the terms and conditions of such extension is predicated upon the idea

that certain specific territory or course of the extension is contemplated and that the award was void for uncertainty: And

Held also, that the words "the terms and conditions" in section 555 upon which the extension is to be made means more than the mere provision for compensation to persons who may suffer injury therefrom, which is provided for in section 554, and that the arbitrators had ignored the provisions of the Act is not determining "the terms and conditions" as between the municipalities and had failed to decide on all the matters referred to them for determination and the award was bad, and was referred back to the arbitrators.

Du Vernet for the township. *Clement*, K.C., for the town.

Divisional Court]

RUTTAN v. BURK,

[Feb. 1.

Assessment and taxes—Omission to furnish list of lands to be sold—Limitation sections—Assessment Act, R.S.O. 1897, c. 224, ss. 208, 209—Port Arthur Special Act, 63 Vict. c. 86 (O.)—Conveyance by owner after sale—32 Hen. VIII. c. 9—Repeal of Act after action brought.

The omission of the treasurer of the municipality to furnish to the clerk a list of the lands liable to be sold for taxes is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act nor the provisions of the special Act, relating to sales for taxes in Port Arthur, 63 Vict. c. 86 (O.) are a protection to the tax purchaser.

The owners of land sold for taxes conveyed it after the tax sale to the plaintiff, who then brought an action against the tax purchaser to set aside the sale. The statute 32 Hen. VIII, c. 9, was in force when the conveyance was made, and when the action was brought but, was repealed before the trial of the action.

Held, that the prohibition of the statute applied, and that the action could not be maintained. Judgment of Ferguson, J., affirmed.

Clute, K.C., for appellant. *Anglin*, K.C., for respondent

Trial, Meredith, C. J. C. P.] COULTER v. EQUITY FIRE INS. CO. [Feb. 2.
Fire insurance—Interim receipt—Estoppel—Statutory conditions—R.S.O. 1897, c. 203, s. 168.

Action on an interim receipt of the defendants to recover in respect of a fire which occurred Oct. 23, 1902. The plaintiffs through an agent of the defendants verbally applied, Nov. 7, 1901, for an insurance for one year, and the defendants accepted the risk for one year, at a premium of \$33.60, and gave an interim receipt, which however, provided in terms that the insurance should be for 30 days only. On Nov. 30, 1901, the plaintiffs paid a full year's premium to the agent, and believed themselves insured for the whole year. According to his usual course of dealing with the defen-

dants, the agent did not pay over the premium to the latter till Jan. 20, 1902, who accepted, knowing for what it was paid. They did not, however, issue a policy, and after the fire had occurred repudiated liability, on the ground that they had only insured the plaintiffs for 30 days.

Held, that the defendants were liable, for if they intended to treat the insurance as terminated at the end of 30 days, it was their plain duty to have so informed the plaintiffs, and returned them a proper proportion of the premium paid, and not having done so they were legally, as well as morally liable both by virtue of the second statutory condition, R.S.O. 1897, c. 203, s. 168. (2). and also on the ground of estoppel.

Riddell, K.C., and *John Greer*, for plaintiffs. *Watson*, K.C. for defendants.

Ferguson, J.]

IN RE BAR v. McMILLAN

[Feb. 8.

Division Courts—Judgment summons—Form of affidavit—R.S.O. 1897, c. 60, s. 243—Prohibition.

An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that "the sum of \$65.10 of the said judgment remains unsatisfied as I am informed and believe", the judgment being for more than \$65.10, is not such an affidavit as is required by s. 243, of the Division Courts Act, R.S.O. 1897, c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit.

Middleton, for defendant. *Gamble*, for plaintiff.

Divisional Court] CITY OF TORONTO v. TORONTO RAILWAY CO. [Feb. 9.
Interest—Contract—Sum certain—Rental of track—Interest by way of damages—Demand of payment.

By the agreement in question in the action the defendants agreed to pay to the plaintiffs \$800 per annum per mile of single track and \$1600 per mile of double track occupied by the defendants' railway, not including "turnouts", in four equal quarterly instalments on the 1st of January, April, July and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts" and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs and greater than that contended for by the defendants. The plaintiffs had from time to time demanded payment of the sums payable

to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgment.

Held, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs; that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not, under s. 114 of the Judicature Act, R.S.O. 1897, c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithmetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest and therefore within section 113 of that Act.

Bicknell, K. C., for defendants. *Fullerton*, K. C. and *Chisholm*, for plaintiffs.

Divisional Court] IN RE SYDENHAM SCHOOL SECTIONS. [Feb. 12.
Public schools—Alteration of school sections—Appeal from township council—Powers of arbitrators—By-law altering school sections—Description of lots.

An appeal by the petitioners from the judgment of STREET, J., reported 6 O.L.R. 417, was argued before a Divisional Court (MEREDITH, C. J.C.P., MACMAHON and TEETZEL, JJ., on Feb. 12, 1904, and at the conclusion of the argument for the appellants was dismissed, the Court agreeing with the reasons given in the judgment appealed from.

Tucker, for appellants. *Rowell*, K.C. for respondents.

Boyd, C., Ferguson, J., Meredith, J.] [Feb. 12.
 FENSON v. C.P.R. Co.

Railways—Cattle on track—Fences—Running at large—Crown lands—53 Vict., c. 28, s. 2 (D).

The Act respecting Railways, 53 Vict., c. 28, s. 2, (D). enacts that, if in consequence of the omission or neglect of a railway company to erect, complete and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines."

The plaintiff's cattle running at large in a municipality under one of the by-laws of which they were permitted so to do got upon Crown lands, and from the Crown lands on to the railway and were killed on the track by one of the defendant's trains.

Held (MEREDITH, J., dissenting), that by virtue of the by-law permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and ramble over all open lands, wastes or commons, even if owned by the Crown, if no objection is taken thereto and no barrier or fences be erected against them.

Per MEREDITH, J., Municipal bodies have no such ownership or control over private property or Crown lands as to enable them to give a right to the cattle in question to be upon the lands from which they strayed on to the railway track, and the cattle were trespassers thereon and the defendants therefore not liable. There are no commonable rights in Crown lands.

J. H. Clary, for plaintiffs. *D'Arcy Scott*, for defendants.

ELECTION CASES.

MacLennan, J.A.] IN RE HURON VOTERS' LISTS. [Jan. 27.

Parliamentary elections—Voters' lists—Revision of lists—Correction of lists—Complainant—Posting up lists—Time for objecting—Deputy registrar of deeds.

A person resident in, and entitled to be placed upon the manhood suffrage register for a town forming part of an electoral district is entitled to require the revision, under s. 13 of the Ontario Voters' Lists Act, R.S.O. 1897, c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' List Act, R.S.O. 1897, c. 7.

A deputy registrar of deeds is not entitled to vote at an election of a member of the Legislative Assembly of Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district.

The date mentioned by the clerk of the municipality in the advertisement published by him pursuant to s. 12 of the Ontario Voters' Lists Act, R.S.O., 1897, c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement.

Proudfoot, K.C., appeared for certain electors interested.

Province of Manitoba.

KING'S BENCH

Perdue, J.]

MANNEER v. SANFORD.

[Jan. 12.

Principal and agent—Misrepresentation of authority of agent—Liability for—Measure of damages.

Action against executors for specific performance of alleged agreement for the sale of land by them to plaintiff, and in the alternative against Riley, one of the executors for damages for misrepresentation of his authority to make a contract of sale that would be binding on all the executors who were three in number. The learned judge found the facts as follows: The property in question was valued by the executors at \$750 and they were offering it for sale at that price. An offer in writing to buy it for that sum was made on behalf of the plaintiff to Riley who accepted the offer and caused a formal agreement of sale by the executors to the plaintiff to be drawn up on a form used by the executors and embodying the full terms and conditions of the sale. This agreement was forwarded in a letter signed by Riley to the plaintiff to be executed by him. The plaintiff did so and returned it to Riley with a cheque for the cash payment agreed on. It afterwards turned out that Riley had no power to bind the executors; but if he had there was an agreement of sale sufficient under the Statute of Frauds to bind the executors. The executors refused to carry out the sale as the land had increased in value.

Held, that Riley was liable to the plaintiff for the damages suffered by him in consequence of his relying on the misrepresentation of Riley that he had authority to make a sale for the executors.

Collen v. Wright, 7 E. & B. 301; 8 E. B. 647; *Halbot v. Lens* (1901) 1 Ch. 344, and *Starkey v. Bank of England* (1903) A.C. 114, followed.

Held, also, that such damages were to be measured by the loss of the profit that the plaintiff would have realized if the sale had been carried out, with an additional allowance for his time and trouble expended in the matter. Judgment for payment by Riley of \$150 damages and costs of the action, without any set off of costs by either defendants; and action dismissed without costs as against the other executors.

Anderson and Hudson, for plaintiffs. *Aikins*, K.C., for Riley. *Robson*, for executors.

Province of British Columbia.

SUPREME COURT.

Irving, J.]

[Oct. 28, 1903.]

BYRON N. WHITE CO. *v.* SANDON WATER AND LIGHT CO.

Act of incorporation—Taking possession—Consent—Laches—Injunction not proper remedy.

The defendants were an incorporated company for the purpose of supplying water and electric light for the town of Sandon. They went to plaintiffs' property and erected dams, flumes and tanks for water power purposes. The manager, the men and local officers of the plaintiffs passed by from day to day the works of the defendants on such grounds without objection being taken. The act of incorporation authorized the defendants to go upon the lands of all persons for the purpose of their works after they had complied with s. 9, as follows: "but the powers (other than the powers to enter, survey, and set out and ascertain what parts thereof are necessary for the purposes aforesaid or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant-Governor in Council." This sanction the defendants did not obtain until March 25, 1902, but prior to this action being commenced. Sec. 13 of the act of incorporation further provided for the ascertaining by arbitration of the amount of all damage done.

Held, notwithstanding the above provision as to taking possession, that the defendants did take possession of the property in dispute in the fall of 1897 and erected an electric light plant to supply the town of Sandon with light, and that no objection was taken by plaintiffs until the spring of 1902. "And further that I think the plaintiffs were guilty of laches, having stood by and permitted the defendants to incur expense. It is quite apparent that what the plaintiffs wish to do is to remove the defendants off their ground in order to take advantage of its favourable situation. An injunction cannot be granted because the defendants are now in a position by virtue of the permission obtained from the Lieutenant-Governor in Council to take possession of that property. Since the 25th of March they are rightfully in possession of this property. The plaintiffs should have appointed an arbitrator under the provision of the defendants' act, and in that way have determined the value of the property taken from them." Action dismissed with costs.

John Elliott and *R. S. Lennie* for plaintiffs. *S. S. Taylor*, K.C., for defendants.

Full Court] ELLYN *v.* CROW'S NEST PASS COAL CO. [Nov. 6, 1903.
Practice—Test action.

Appeal from an order of Forin, Lo. J., consolidating this and 43 other actions with one other action, which had been selected out of 29 other similar actions for trial as a test action. Forty-four actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion extending over a large area of defendants' coal mine, and plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of workmen who were killed not all being of the same class and also on account of the different conditions in the different parts of the mine where death occurred the defendants contended that one action would not be a fair test of all the others.

Held, that the defendants should have the right to select four actions as test actions for those of the same class. Order of Forin, Lo. J. set aside. Appeal allowed, costs in the cause.

Bodwell, K.C., for appellants. *S. S. Taylor*, K.C., for respondents.

Full Court.] HOPKINS *v.* GOODERHAM. [January 25.
Master and servant—Dismissal of servant—Breach of contract—Damages—Action before expiration of term for which engagement was made—Practice—Condition precedent—Rule 168—Evidence—Wrongful rejection of—Duty of counsel to put evidence squarely before judge—New trial.

Appeal from judgment in plaintiff's favour in an action for damages for wrongful dismissal. The plaintiff, who had been engaged for one year from August, 1902, by defendants at a monthly salary, was dismissed wrongfully, as the jury found, in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—

Held, by the Full Court, affirming the judgment entered at the trial, that plaintiff was entitled to recover damages covering the unexpired term of his engagement.

The statement of claim alleged a contract of hiring plaintiff as superintendent of a mill arising from two letters, without setting them out, and without alleging the continuance of the construction of the mill, which was one of the conditions stated by defendants in their second letter. The defence denied the allegations in the statement of claim, and alleged the contract was contained in the second letter.

Held, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill.

Where a party seeks a new trial on the ground of wrongful rejection of evidence he should shew that the evidence sought to be adduced was put squarely before the judge so that his mind was applied to the point. Appeal dismissed.

A. C. Galt, for appellant. *C. R. Hamilton*, for respondent.

SILLA v. CROW'S NEST PASS COAL CO. [January 25.

actions—Consolidation of actions—Plaintiffs in some actions outside jurisdiction—Security for costs—Waiver.

plaintiff from an order for security for costs of action. Actions by different plaintiffs were commenced against defendant, and subsequently forty-four similar actions were commenced. An action known as the *Leadbeater* action was ordered to be tried for the twenty-nine, and afterwards by consent four of the forty-four were consolidated, by order of the Full Court, as test actions and ordered to be tried as test actions for the three. In the *Leadbeater* action, and in one of the four actions, the plaintiffs resided in the jurisdiction and in the other three resided outside the jurisdiction:—

The Full Court, reversing Irving, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs.

For, K.C., for appellant. *E. P. Davis*, K.C., for respon-

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LEADBEATER v. CROW'S NEST COAL CO. [Jan. 25.

Examination of solicitor—Order for—Summons—Affidavit in support—Rule 383.

On an order of Irving J., requiring the plaintiff's solicitors to examine W. R. Ross to attend for examination as to whether either party had an interest in the subject matter of the suit.

In several actions for damages brought against colliery owners for the deaths of miners killed in an explosion and the defendants applied to the Full Court for an order for the examination of the plaintiff's solicitors as parties, and while the summons was pending an order on summons, in support of which an affidavit was filed, for the examination of the solicitors as to what interest they had in the subject matter of the action.

The Full Court held that the summons should have been supported by an affidavit, and that it was probable that the solicitors had some interest in the result of the litigation, and the order should not have been made.

An order under r. 383 cannot be issued without an order therefor. *For*, Drake, J. dissenting.

For, K.C., for himself and co-appellant. *E. P. Davis*, K.C.,

2.

Book Reviews

Commentaries on the Law of Master and Servant, by C. B. Labatt, B.A. (Cantab.) in three volumes. Vols. I. and II,—Employers' Liability; Vol. III,—Relation, Hiring and Discharge, Compensation, Strikes, etc. Canadian edition. Lawyers' Co-operative Publishing Co., Rochester, N.Y.; Canada Law Book Co., Toronto, Canada, 1904.

This "monumental work" is reviewed at length in our editorial columns by Mr. N. W. Hoyles, K.C., Principal of the Ontario Law School. Words of commendation from such a master of the subject and from such an impartial critic are indeed words of praise. A correspondent, himself an author of repute, referring to the above work makes this observation:—
"Mr. Labatt's book is a splendid thing. I am amazed at such industry."

H. O'BRIEN.

A Text Book of Legal Medicine and Toxicology, edited by Frederick Paterson, M.D., and Walter S. Haines, M.D. Vol. II. Philadelphia, New York, and London: W. B. Saunders & Co. 1904. 1,500 pages.

We have already reviewed the first volume of this excellent work. (See ante vol. 39, p. 640). The editors and contributors occupy such a high position in the medical world that their names are a guarantee that the information given will be of the most accurate and useful character. The contributors to the second volume are twenty-four in number, each dealing with subjects in which they are recognized experts. Carefully executed illustrations lend their aid to the value of the work. Part I. discusses sexual disorders, infanticide, marriage and divorce, malpractice, etc. The concluding portion of the first part has a chapter on the medicolegal relations of the X-rays, a new subject, but one of great importance. Part II. treats of poisons, defining and classifying them, stating the conditions affecting their action, tests, etc., together with papers on post mortem examinations, medicolegal examination of blood stains and a variety of other subjects. Toxicology is discussed at great length and with careful minuteness and thorough research. Even to the layman this part of the work is of much interest, whilst to professional men, who, in the course of their practice, have occasionally to read up matters treated of in this work, the information given is invaluable.

The American Law of Landlord and Tenant, by John N. Taylor, 9th ed., revised by Henry F. Buswell. Vols. I. and II. Boston: Little, Brown & Co. 1904. 1,130 pages.

Little need be said as to the value of such a well-known standard text book as this. Similarity of circumstances between ourselves and our

friends south of us renders treatises on this important and every day subject almost as useful in Canada as in the United States, especially when the English authorities are called. We think the author, or rather the present editor, might with great advantage to his readers, have used material to be found in our Canadian reports, but this he does not seem to have done. This edition has been subjected to a critical revision, and many of the notes have been collated and condensed. For fifty years this book has held a foremost place; and the modern development of the law of landlord and tenant may be interestingly noticed by a comparison between the various editions.

Obituary.

EDWARD MARTIN, K.C. D.C.L.

This well known and highly esteemed gentleman, who died at Hamilton, Ontario, on the 14th ult. was the son of Richard Martin, M.A. T.C.D., for many years Sheriff of the County of Haldimand. The family to which he belonged was one of the oldest and most respected in the County of Galway, Ireland. The deceased was born in 1834 at Derryclare, his father's residence. Choosing the legal profession, he was called to the Bar in 1855, and up to the time of his death was in active practice in the City of Hamilton. Mr. Martin was appointed a Queen's Counsel for Ontario in 1876, and for the Dominion in 1885. He was one of the oldest Benchers of the Law Society for Upper Canada, and President of the Hamilton Law Association since 1890. Not only was Mr. Martin well known as a learned and successful lawyer, but he took a deep interest in matters connected with the affairs of the Church of England of which he was a member; and was appointed the first Chancellor of the Diocese of Niagara in 1876, an office which he held until his death. He was also a member of the Corporation of Trinity University. A man of independent mind and thought, he joined the Equal Rights movement of which such men as the late Dalton McCarthy, K.C., Col. O'Brien, Principal Caven, E. Douglas Armour, K.C., were some of the exponents. His five sons followed their father's choice of a profession:—Kerwan Martin of Hamilton, Mr. Justice Archer Martin of Victoria, B.C., Darcy Martin of Hamilton, Alexis Martin of Victoria, B.C., and Frederick Martin of Sault Ste. Marie. At a special meeting of the Hamilton Law Association, a resolution was carried expressing their regret at the death of their late President who "for many years presided with care and judgment over the affairs of this Association and gave much valuable time and services to the promotion of its interest. . . . His high character and great legal ability were recognized throughout the whole Province, and his reputation placed him in a prominent

position amongst the members of the Ontario Bar". Of his personal character it is truly recorded in one of the papers in his own City that he was "one of the most companionable men, and his natural dignity blended well with the geniality and the gentle courtesy that endeared him to a large circle of friends and acquaintances. He was one of the men who radiate kindness and who win respect by modest worth". A high-minded honorable man and a staunch and genial friend his loss will be great to those who knew him.

Flotsam and Jetsam.

Lord Alverstone and the Colonial Secretary:—It is useless for any British statesman to attempt to persuade us that Lord Alverstone treated our Commissioners with courtesy and fairness, or that he did not depart from the letter of his oath to render a judicial decision on the point at issue. For some time we suspended judgment. Mr. Aylesworth and Sir Louis Jettè had made their serious and formal accusation over their signatures in the most official and public manner; and we, with sensible self-restraint, awaited his reply. But when he refused to accord us the courtesy of an explanation, we no longer suspended judgment; and now our opinion has hardened into an historic certainty that two islands were taken from us and given to the Americans by the British Commissioner in violation of his oath and with the purpose of propitiating the big Republic at our expense. Thus, the best thing that Colonial Secretaries in future can do is to leave the matter alone. A full explanation from Lord Alverstone now would be late, but it would be listened to. Nothing else, however, can make any headway at reopening the case. Least of all we are in a mood to hear with patience eloquent praise of the intellectual qualities and high character of Lord Alverstone. We had rather judge for ourselves these intellectual qualities in the defence of his conduct which he should have written long ago, as we have already formed our opinion of the high character of a man who takes an oath to give a judicial decision, and then does nothing of the kind, and who agrees with two Canadian colleagues to pursue a certain definite course, and then takes another without even letting them know of his intended breach of faith.—*Toronto News.*

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Mr. Lyman P. Duff, K.C., of Victoria, of the firm of Bodwell & Duff, has been appointed to the Supreme Court of British Columbia in the room of Mr. Justice Walkem, retired. This appointment is one of the very best that has been made by the present Government. Mr. Duff is a learned lawyer, has a great reputation as a Counsel, is a man of wide views, is free from fads, and has a mind cast in a judicial mould. The appointment is none the less welcome and to be appreciated in that Mr. Duff never was a politician, but has attained his high position at the Bar by force of character, brains, industry, and rectitude. He was born in Toronto, where his father, a retired Methodist Minister, still lives. Mr. Justice Duff is a graduate of Toronto University.

The care that is necessary in the drafting of statutes, as well as the want of such care, occasionally evinced, was illustrated recently in connection with an amendment to the Municipal Act, in reference to the newly constituted Board of Control in the city of Toronto. This Board was first created in 1896. Special legislation in reference thereto, so far as the city of Toronto was concerned, was enacted in 1903. The question arose as to whether a County Judge had, under the provisions of the Municipal Act, jurisdiction to try in a summary way the validity of a Toronto controller's election, in the same manner as he would have had the right in the case of a mayor or alderman. The County Judge held that he had such jurisdiction; but Mr. Justice Teetzel, on appeal, came to the contrary conclusion, holding that the words used in the statute fail to bring a controller in the city of Toronto within the summary trial provisions. Both judges were agreed as to what was the intention of the legislature; but the appellate judge emphasized the correct legal proposition that this intention must be ascertained by the words used—and that it was not competent for the court to extend them; in other words, that the court must interpret and not legislate, and that in this case the words used were insufficient.

There is much common sense in some of the remarks contained in an address recently given to students of a law class in the Michigan University. What was there said is largely true here. The lecturer was of the opinion that it was a mistake for students to desire to go to large offices in cities for their legal training, in that there is much more practical and helpful education and experience to be gained in the office of a good reputable country practitioner than in the offices of the leaders of the Bar; and education, let it be remembered, is not merely book learning. Practitioners in large cities very commonly find that the most useful students are not town bred university men, but country boys who have commenced their studies in localities where it was a necessity to read up and find out the law and work out questions of practice for themselves, rather than to take the easy way, too common, for example, in Toronto, of asking others what they should do under certain circumstances. Theoretical knowledge and law schools are all right so far as they go; but they do not go all the way.

Although in some of the older commentaries on the common law as well as in some of the ancient reports (e.g. Y.B. 1 Edw. II. [Seld. Soc.] p. 33) the Latin term 'causa' is used to denote 'consideration,' it must not be confounded with the 'causa' of the civil law. In that system of jurisprudence while the term 'causa,' according to some writers (see Rogron "Code Civil," in *Codes Français Expliqués*, p. 209), means more than the mere motive which would induce a man to bind himself by an agreement, yet it is undoubtedly something less than 'consideration' in the common law. Under our system 'causa' invariably connotes a valuable inducement for a promise. The civilians, on the other hand, will enforce a promise without inquiring into the value of the inducement for it; and when we meet with the expression 'without cause' in their law it does not mean that there was no consideration for the promise, but that the consideration has failed,—for instance, to quote an example found in the books, if one gives a promise to pay 100 aurei, at the end of six months, in consideration of a sum intended to be lent, and the money is never lent, the promise cannot be enforced because the agreement is sine causa. In the case of *Thomas v. Thomas*, 2 Q.B. 851,

counsel for defendant contended that in the common law the cause or inducement for making a promise was a good consideration therefor. But Patteson, J., said: "It would be giving to 'causa' too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff." This statement of the English doctrine of consideration is regarded as correct and authoritative both by the courts and the commentators of our own day. However, it is worthy of note that Eustis, J., in *Mouton v. Noble*, 1 La. Ann. 192, undertook to say that "Civilians use the word 'causa,' in relation to obligations, in the same sense as the word 'consideration' is used in the jurisprudence of England and the United States." But an examination of the leading American writers on the subject shews clearly that there is no difference in principle between their law and ours; and the case of *Thomas v. Thomas*, above cited, is relied upon by Dr. Hare and others as conclusive of the distinction between 'causa' and 'consideration' as the terms are employed in the jurisprudence of the present day.

COMPULSORY RETIREMENT OF JUDGES.

By the Act of last session of the Dominion Parliament, 3 Edw. VIII., c. 29, s. 2, it seems to be assumed that every County Judge is unfit for his judicial work when he has attained the age of eighty years, for, when that period arrives, he is compulsorily retired. That most men are past their work at that age is undoubtedly true, but it is not true of all of them, and to the latter it may work injustice. There is in the present day a tendency to put young and inexperienced men in positions which might be filled with more advantage by men of mature age and ripened knowledge. Judicial experience is a most important factor in the usefulness of a judge, and when mental vigour goes hand in hand with experience, the best results are attained.

ence ripened and their store of knowledge so well filled, they cannot, we think, truly say that they are quite as able for the continued strain necessary for the conduct of a long trial as they once were; and we therefore the more applaud the enactment which gives to those who are thereby presumed to be failing (whether they think so or not) a pension equal to the salary previously enjoyed. That this provision should be made is a simple matter of justice; and is of right, and not of favour, especially in view of the small emoluments given to our judges. It may be hoped also that, to a limited extent, at least, it may be an inducement to the best men at the Bar to accept judicial appointments and so sustain the high character of our judiciary.

LIABILITY OF HUSBAND FOR HIS WIFE'S TORT.

Under the Married Women's Property Act, (R.S.O. c. 163) s. 17, a husband is liable for the wrongs committed by his wife before or after marriage "to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting any payments made by him or any sums for which judgment may have been bonâ fide recorded against him in any legal proceeding in respect of any such debts, contracts, or wages, for or in respect of which his wife is liable." But this section also provides that "nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the first day of July, 1884, for or in respect of any such debt or other liability of his wife aforesaid."

While, therefore, the liability of husbands married after the 1st July, 1884, in respect of debts committed by their wives before or after marriage is limited to the property of the wife received by the husband and remaining in his hands as above mentioned, the liability of husbands married before that date is governed by the law as it stood prior to 1st July, 1884.

The course of legislation in regard to married women has not been strictly logical or consistent in England, as Mr. Indermaur has pointed out in a paper published in a recent number of the *English Law Times*, neither has it been so in Ontario where we have followed more or less exactly in the wake of English legislation. It has been lacking in a broad and comprehensive view of the subject and has been characterized by timidity which has

resulted in the patchwork legislation with which we are only too familiar.

The common law on this point whatever may be thought of its ethical justice, was at least consistent. Under it marriage had the effect of vesting all the wife's chattel property, and also considerable rights in her real property in her husband. That being the case, during coverture the husband was in effect liable for the wife's torts committed by her before or after marriage. It is perhaps not technically correct to say that he was "liable," in the same sense as a wrong doer, but at all events he was a necessary party to an action against the wife for a tort whether committed before or after marriage. If judgment went against her, it went against him also; and was leviable out of his goods, and yet if he died pending the suit it did not abate, but might be continued against the surviving wife. On the other hand if the wife died, the action abated and the husband ceased to be liable.

But the statute law has been from time to time enroaching on and taking away the foundation of the common law rule by depriving the husband of his common law rights in both his wife's real and personal property, but at the same time has left him burdened with some of the obligations which the common law imposed as a consequence of the rights which it conferred. One can hardly suppose if the amendment of the law had been undertaken in a scientific manner that this anomaly would have been suffered to exist. It is because of the want of the scientific method in making amendments in the law, that not only in this, but in other important particulars, (notably in respect of the devolution of estates in case of intestacy), that we find the law is thrown into confusion or into an anomalous condition by our legislators.

The course of amendment is generally as follows:—It strikes *someone*, for instance, that it is unreasonable that marriage should *have* the effect of vesting all of a wife's property in her husband; accordingly an act is duly drawn to amend the common law in *this* respect, but the legislator altogether neglects to take a comprehensive view of the subject by taking both the husband's rights on the one hand and his liabilities on the other into consideration, but fatuously, as we think, takes altogether one-sided view of the matter, and while he cuts off the husband's rights, he leaves his liabilities, which were the consequence of these rights, untouched.

That this is the result as to persons married before 1st July, 1884, is shewn by the recent decision of a Divisional Court (Meredith, C.J.C.P., MacMahon and Teetzel, JJ.) in *Traviss v. Hales*, 6 O.L.R. 574. In this case the plaintiff sued husband and wife for a slander by the wife living, coverture. The defendants were married in 1875, and the Court held that the husband was liable, and a judgment against him was affirmed—and yet for fifteen years before the marriage in this case took place the rights of a husband in his wife's property had been taken away and separate property rights conferred on wives. Osler, J., in *Amer v. Rogers* (1880) 31 C.P. 195, came to the conclusion that the effect of this legislation was inferentially to relieve the husband from liability for his wife's torts, but later decisions in England have led to the conclusion that though the legislature had taken away a husband's rights in his wife's property, it had nevertheless left him burthened with the common law liability for her torts, and a similar conclusion was arrived at by the late Mr. Justice Rose in *Lee v. Hopkins* (1890) 20 Ont. 666, which is now adopted and affirmed by the Divisional Court.

GEO. S. HOLMESTED.

LANDLORD AND TENANT AND THE STATUTE OF FRAUDS.

In the absence of a written agreement or of possession being acquired by a tenant, his rights as against his landlord, even where he may have paid rent in advance, will, it would appear, receive scant recognition in the courts.

In Agnew on the Statute of Frauds at p. 152 is found this proposition: "A contract for the taking or letting of furnished lodgings by the day or week or month is a contract for an interest in land, if specified rooms are let. But an agreement to take furnished lodgings in a boarding house, it not being intended to give the right to the exclusive occupation of any particular part of the house, is not within the statute." The authorities cited are: *Inman v. Stamp*, 1 Starkle, 12; *Edge v. Stafford*, 1 C. & J. 391. The same proposition is repeated in almost identical words in Addison on Contracts, 9th ed. at p. 24, and the same authorities are cited.

In *Inman v. Stamp*, the defendant agreed to take apartments in plaintiff's house to be entered upon at Christmas. On December

24th, defendant notified plaintiff that he receded from the bargain. It was held by Lord Ellenborough that this was a contract for an interest in land within the 4th section of the Statute of Frauds and, therefore, that the agreement was void, but that it would have been otherwise had the defendant entered on the premises.

In Dart on Vendors and Purchasers, 6th ed., p. 228, the point is dealt with as follows: "And although the actual demise by parol for any term not exceeding three years at a rent not less than two-thirds of the improved value is valid under the second section of the statute, an executory agreement for such a demise is void unless in writing. So a parol agreement by a lessee for an assignment for the residue of his term, being less than three years, is void."

Then what will be the effect of the payment of a part of the proposed rent? *Maddison v. Alderson* (1883) 8 App. Cas. 479, is authority for the proposition that a payment of part, or even the whole of the purchase money, will not be treated as part performance. There were earlier cases where individual judges expressed varying opinions (for instance, the cases cited in the Digest of English Case Law, vol. 13 at p. 1770, in which a distinction is attempted to be drawn between payment of earnest money and payment of a substantial sum on account), but the law is now apparently well settled. In *Maddison v. Alderson*, Selborne, L.C., says: "It may be taken as now settled that part payment of purchase money is not enough; and judges have said the same even of payment in full." All the other judges agree with Lord Selborne and there are no qualifying words.

The above case was discussed by Baggallay, L.J., and Brett, L.J., in *Humphries v. Greene*, 10 Q.B. 148. Adopting the language used by the Court of Appeal in *Maddison v. Alderson*, Baggallay, L.J., thought that the words of Lord Selborne ought to be qualified by the following words: "Unless it is shewn that the payment was made in respect of the particular land and the particular interest in the said land which is the subject of the parol agreement"; but Brett, L.J., differed directly from Baggallay, L.J., holding that the mere payment of part, or even of the whole, of the purchase money will not be sufficient, under any circumstances, to exclude the operation of the statute.

W. E. RANEY.

TRADE UNIONS AND BREACHES OF CONTRACT.

The learned editor of the *Law Quarterly Review* in the January number deduces some conclusions from the decisions in England on the subject of Trade Unions, and as to breaches of contract and conspiracy connected therewith, which may helpfully be reproduced. He says :

"*Glamorgan Coal Co. v. South Wales Miners' Federation* [1903] 2 K.B. 545, 72 L.J.K.B. 893, C.A. is the latest of the line of cases which begins just fifty years ago with *Lumley v. Gye* (1853) 2 E. & B. 216. From these cases we may now deduce, though with different degrees of certainty, the following conclusions :

(1) If X, knowing that N has entered into a contract with A, induces N to break that contract, X has *prima facie* committed a wrong for which A, if he suffers damage thereby, has a right of action : *Quinn v. Leathem* [1901] A.C. 495, 70 L.J.P.C. 76, and the principal case.

(2) Though X's conduct is *prima facie* actionable on the general principle that a violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere, without justification or excuse, with contractual relations recognized by law (*Quinn v. Leathem* [1901] A.C. p. 510, judgment of Lord Macnaghten, and see *Mogul Steamship Co. v. McGregor* (1889) 23 Q.B.D. 614, judgment of Bowen, L.J.), yet there may be just cause, or, what is the same thing, legal justification for X's interference.

(3) It is not yet possible to define the circumstances which may constitute a justification for procuring a breach of contract ([1903] 2 K.B. at p. 573, judgment of Romer L.J.) It must in each case be a question for the Court whether the circumstances found to exist are sufficient for that purpose. The mere fact that X holds N's contract with A to be a violation of a prior contract with X is not in itself a justification of X's inducing N (by threat at any rate) to violate N's contract with A : *Read v. Friendly Society of Co-op. Stonemasons* [1902] 2 K.B. 732, 71 L.J.K.B. 994, C.A.

(4) There seems to be a distinction between X inducing N to break a contract with A, by threats, by payment or otherwise, and X giving advice to N which leads him to break a contract with A (see [1903] 2 K.B. at p. 572, judgment of Vaughan Williams L.J.). The difference may be thus illustrated. N is under a contract

with A to go out to India and manage A's business there. X wishing to obtain N's services offers him a higher salary than that which is promised by A, and thereby induces N to break his contract with A and enter into X's service. Y is a doctor whom N consults as to the effect on his health of a residence in India. Y knowing of N's contract with A tells him that he will die within a month if he goes to India, and that he will be wise at all costs to break his contract with A. N in consequence declines to go out to India. X's conduct is clearly actionable. Y's conduct almost certainly is not. X induces N not to go out to India; Y, being bound by professional duty to do so, gives N his opinion as to the probable effect on N's health of performing his contract to go to India. Probably it is safe to say that in this class of cases disinterested advice, honestly given, is privileged.

(5) It is clear that malice, in any reasonable sense of that much abused term, is not material to the cause of action.

(6) If X and Y combine together to induce N, whether by threats or by payment, to break a contract with A, they are, unless there is something in their position which justifies their interference, liable to an action for conspiracy: *Quinn v. Leathem*, and the principal case."

ABSENCE OF FIRE ESCAPES.

The *Chicago Legal News* publishes in a recent issue an article written by Mr. Seymour D. Thompson on the risk of injury in consequence of the absence of fire escapes, referring therein to a case decided in the Province of Quebec. His observations are as follows:

"The decision of the Supreme Judicial Court of Massachusetts, in *Jones v. Granite Mills*, 126 Mass. 84, is one of the most cold and brutal decisions to be found in any American law book. It ought to be denounced from one end of our land to the other, until judges shall cease, from very shame, to quote it as authority. Certain truisms are known to the profession without massing cases in support of them. An employer is bound to exercise reasonable care, to the end of keeping his premises safe for the occupancy and use of his employees. This duty of exercising this reasonable care is a primary and absolute duty, in the sense that he can not absolve himself from its performance by attempting to devolve it

upon another, whether an independent contractor, a superior servant, or a fellow-servant of the servant who is killed or injured by his failure to perform it. In this sense it is frequently called a non-assignable or unalienable duty. The most obvious conception of law, justice, and humanity, would assign to this class of duties, the duty which a master owes to his servants of keeping his premises provided with reasonable means of exit in case of fire; of providing reasonably efficient apparatus for the extinguishment of fire; and of keeping such apparatus in a reasonable state of repair. All these obligations on the part of the master are repudiated by the decision in question, and the risk is put upon the injured or murdered servant, and the failure of the master to perform this primary duty is put upon the shoulders of a fellow-servant, and the infamous conclusion reached that the catastrophe presumptively is due to the failure of some fellow-servant to do his duty, and that the master is therefore not liable.

In this case it appeared that the plaintiff and other employees worked on the upper floor of a six-story factory building. There was no fire escape above the fifth floor, nor any exit from the sixth floor except by a winding stairway in a tower at the corner of the building. The fire occurred through the overheating of a spindle of a spinning-mule. The fire apparatus was out of order. Ignoring the obvious conclusion that it was a primary duty of the master to keep the fire apparatus in order, the court assumed, in the absence of evidence speaking upon the question, that it was out of order in consequence of the negligence of a fellow-servant of the plaintiff. It was a cold and brutal assumption, indulged in for the purpose of putting money and property above life and humanity. This has been called 'The Moloch decision.' It is not creditable to the head or to the heart of the court that rendered it, or to the judge who consented to be its mouthpiece. It is opposed to the settled principles of the common law. No reasoning could properly result in the conclusion that the failure to perform a duty primarily resting upon the master, that of taking reasonable measures to render his premises safe for his servants, could be shuffled off as the duty of some fellow-servant. This dreadful holocaust, in which a great many people, some of them women and children, were burned to death, and this miserable decision, exonerating the proprietors of the building where their negligence was absolutely plain, recall to mind that passage of Milton in which he describes :

' First Moloch, horrid king, besmear'd with blood
Of human sacrifice, and parents' tears,
Though for the noise of drums and timbrels loud
Their children's cries unheard, that passed through fire
To his grim idol. Him the Ammonite worshipped.'

The last sentence must have been a slip of the tongue of the *great* blind poet in dictating the famous passage. In view of the *Massachusetts* decision above quoted, it should read, 'Him the *Mammonite* worshipped.'

If the foregoing decision expresses the doctrine of the common law, then the servant necessarily assumes the risk of being burned to death through the negligence of the master in failing to provide suitable fire escapes or to keep his apparatus for extinguishing fire in proper order. If the master is not bound, under the principles of the common law, to afford his servants suitable means of egress from the building by means of fire escapes in case of a fire breaking out therein, the servant necessarily assumes the risk of the situation, however dangerous it may be. For example, there is a decision to the effect that negligence on the part of the proprietor of a factory can not be predicated of the fact that the windows leading to the fire escapes were screwed down, where such windows were light structures and could easily have been kicked out, with as little delay as would be occasioned by raising them if unfastened, and propping them up.* A servant can kick the window out if he happens to think of it and is not smothered by smoke, and if his faculties are not overwhelmed in the dreadful position in which he suddenly finds himself placed—a conclusion which might impress the minds of the judges could they be placed in such a position and be kept there for a brief period and then 'kicked out.'

But all the courts have not bowed to this doctrine, or at least have not applied it under all circumstances. One court has held that a boy of nineteen, employed in an upper story of a factory, the means of escape from which are insufficient in case of fire, is not presumed, as matter of law, to have assumed the risk, but that whether he has done so is a question of fact.†

* *Huda v. American Glucose Co.*, 154 N.Y. 474; affirming s. c. 13 Misc. (N.Y.) 657; 34 N.Y. Sup. p. 931.

† *Schwandner v. Birge*, 33 Hun (N.Y.) 186.

A Canadian court, taking an enlightened and humane view of the subject, has dealt with it in the manner indicated by the abstract of its decision in the marginal note.‡ It should be kept in mind that the conclusion may be different where there is a statute requiring the building to be equipped with fire escapes and where the statute is violated by the proprietor of the building, whereby his servants are burned to death or injured. In such a case, to hold that the servants accept the risk of the statutory negligence of the master would be, in effect, to repeal the statute. Such, it has been held by an enlightened court, is not the law.* Even here a judicial tendency has been discovered to fritter away the protection of such a statute. Where such a state required 'factories' to be equipped with fire escapes, it was held that the existence of a chemical laboratory, the entire output of which was less than twenty per cent. of the business, which was that of a wholesale drug company, did not constitute the place a 'factory' within the meaning of the statute.† But it is suggested that statutes which are designed to conserve human life ought to be liberally construed, in the application of civil remedies, so as to promote the end intended. A building which is in part devoted to the manufacture of chemicals, and which, owing to the nature of the business, is more liable to take fire than if it were some other kind of 'factory,' is within the very policy and mischief of such a statute, and none the less so because the larger part of the building may be devoted to the storage and sale of such chemicals."

‡ A foreman on the top floor of a factory, who, knowing that a fire had commenced in one of the lower stories, directed the employees in his story to return to their work, assuring them that there was no danger, when they would easily have escaped if they had not been thus prevented, was guilty of such negligence, even though he acted in good faith, and in the belief that there was no danger, as will render the employer liable for the death of one of the employees who, when the fire subsequently reached such story, cast herself out of the window under the belief that she could not otherwise be saved, although she could readily have escaped by the stairway: *Macdonald v. Thibaudeau*, 8 Rep. Jud. Que. B. R. 449 (opinion and syllabus in French). Compare with this case *Hernischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1 s. c. 61 S. W. Rep. 419 (where, on a somewhat similar state of facts, there being no contention that the fire was caused by the negligence of the defendant or that it could have been extinguished, it was held not error to direct a verdict for the defendant.)

* *Landgraf v. Kuh*, 188 Ill. 484; s. c. 59 N.E. Rep. 501.

† *Hernischel v. Texas Drug Co.*, 26 Tex. Civ. App. 1; s. c., 61 S. W. Rep. 419.

LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES.

"We have learned that, growing immediately out of the Iroquois theatre disaster, a large number of suits have been filed against the city of Chicago for the alleged failure of its officials to enforce the fire ordinances of the city. While it does not become us, at this stage of the proceedings, to express a personal opinion as to what the law ought to be, it certainly will not offend the proprieties of the case to give an intimation of the tendency of other courts on this question. Chief Justice Gray, in the case of *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332, held it to be a proposition well settled 'that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.' The case from which this quotation is taken should be carefully studied by attorneys about to engage in litigation involving questions of the character we have before us at the present time. Indeed, in a concise and condensed opinion, Chief Justice Gray traces the history and progress of the law on the question from the earliest period of the common law to the present time. From a careful reading of Justice Gray's opinion, it would seem that the only remedy in such cases is by indictment of the city officials guilty of neglect of duty. Thus, in the case of *State v. Corporation of Shelbyville*, 36 Tenn. (4 Sneed) 176, it was held that the mayor and aldermen of a town, whose charter empowered them to abate nuisances, were properly indicted for permitting a slaughter-house to be kept upon the private property of a citizen within the town, to the detriment of the public health and comfort. To same effect: *Cochrane v. Frostburg*, 81 Md. 54. While we believe that these authorities go a little too far, nevertheless the rule appears to be well settled and sustained by reason and authority that where a positive duty is imposed by ordinance on any city official, he is liable to indictment for non-feasance or misfeasance in office for failing, negligently or wilfully, to enforce such ordinance. Coming now to the exact question before us, i.e., the liability of municipal corporations for negligence in the enforcement of municipal ordinances, we find the law to be settled, though not without some dissent, against the imposition of such liability.

The reason of the rule that a municipal corporation cannot be held liable for the non-action of its officers in this regard is stated to rest on the principle of ultra vires—the city not being held liable where the non-action of its officers is contrary to the will of the corporation, as expressed in its ordinances: *Peck v. City of Austin*, 22 Tex. 261, 73 Am. Dec. 261. Chief Justice Marshall in the case of *Fowle v. Alexandria*, 3 Pet. (U.S.) 398, gives expression to his opinion 'on this question as follows: 'That a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance—by an omission of the corporate body to observe a law of its own in which no penalty is provided—is a principle for which we can find no precedent.'

The cases on this subject now cover quite completely, as far as the principle of the thing is concerned, every phase of municipal life. Thus it is held that a city is not liable because of failure to enforce an ordinance requiring excavations to be fenced: *Moran v. Pullman Palace Car Company*, 134 Mo. 641, 56 Am. St. Rep. 543. So, also, where the city authorities temporarily suspended an ordinance forbidding cattle running at large in the streets, and by reason of this suspension, plaintiff was injured by being gored by a bull, it was held that the city was not liable: *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787. Neither is a city liable for injuries caused by a discharge of fireworks, in a case where the city officials granted a suspension for the day of the accident, of an ordinance forbidding the discharge of fireworks: *Hill v. Charlotte*, 72 N. Car. 55, 21 Am. Rep. 451; *Fifield v. City of Phoenix* (Ariz.), 36 Pac. Rep. 916; *Wheeler v. City of Plymouth* (Ind.), 18 N. E. Rep. 532; *Lincoln v. City of Boston* (Mass.), 20 N. E. Rep. 329. So, also, a city is not liable for damages sustained by a property owner because its officials failed to prevent the erection of a wooden building on an adjoining lot, in violation of an ordinance forbidding the erection of wooden buildings within certain limits: *Hines v. City of Charlotte*, 72 Mich. 278; *Forsyth v. Atlanta*, 45 Ga. 752; *Harman v. City of St. Louis*, 137 Mo. 494. In the last case cited, the court said: 'The idea that because the City of St. Louis has exercised the right of passing an ordinance prohibiting structures of a certain character to be built within certain districts therein defined, that therefore it must enforce the observance of said ordinance at the hazard of being subject to all

damages which may ensue from its violation, is certainly as novel as it is startling. While it is the duty of the city, as of all governments, to protect and preserve the rights of her citizens as far as possible, and to provide and pass all needful laws to that end, the government does not guarantee to its citizens freedom from injury by the non-observance or by the positive infraction of those laws or ordinances.' The decisions on this question, however, are not all uniform. Thus in the case of *Cohen v. Mayor*, 113 N.Y. 532, 21 N.E. Rep. 700, it was held that a city was liable for granting express permission to a grocery keeper to keep his wagon in front of his store in violation of an ordinance, whereby injury resulted to a third person. So also was a city held liable where the mayor, contrary to the ordinances, expressly permitted the shooting off of fireworks at the junction of two narrow streets. *Spier v. City of Brooklyn* (N.Y. App.) 34 N.E. Rep. 727. See, also, to same effect: *Cochrane v. Frostburg*, 81 Md. 54, 48 Am. St. Rep. 479; *Baltimore v. Marriott*, 9 Md. 174; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759. In the last case cited which was a case in which a city failed to enforce an ordinance prohibiting "coasting" on the public streets the court said: "It is well settled that the corporation was under an obligation to exercise for the public good the power conferred upon it by its charter to prevent nuisance, and to protect persons and property, and that this duty is not discharged by merely passing ordinances. It is not relieved from responsibility unless there has been a vigorous effort to enforce them."—*Central Law Journal*.

A number of appointments have recently been made to county judgeships; some excellent, some otherwise—and some of them apparently for reasons purely political, and without reference to professional eminence. We are not, however, looking for the millennium in this dispensation, and so, as to those which will not meet with general approval, we are not exactly disappointed. Possibly the time may come, even before that happy period, when some government will arise which will be strong enough to select as judges the best available men at the Bar, without reference to party, or politics or creed.

ENGLISH CASES.

*EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.*

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PRACTICE—JURISDICTION—SERVICE OUT OF JURISDICTION—APPLICATION TO ENFORCE AWARD—ARBITRATION ACT, 1889, s. 12—(R.S.O. c. 62, s. 13)—(ONT. RULE, 162).

In *Rasch v. Wulfert* (1904) 1 K.B. 118, the plaintiffs and defendants who were foreigners resident abroad, had made an agreement to refer disputes between them to arbitration. The plaintiffs had under the agreement appointed an arbitrator and obtained an award in their favour, the defendants having refused to be parties; the plaintiffs now applied under the Arbitration Act of 1889, s. 12 (R.S.O. c. 62, s. 13) for leave to serve the defendants out of the jurisdiction with a summons for leave to enforce the award. The master to whom the application was first made granted leave, but on the return of the summons dismissed the application on the ground that there was no jurisdiction to give leave to serve the summons out of the jurisdiction. On appeal to Ridley, J., that learned judge held there was jurisdiction and reversed the Master's order, but on appeal to the Court of Appeal (Collins, M.R., and Mathew, L.J.) the order of Ridley, J., was reversed. On the appeal it was argued that the award having been made within the jurisdiction it must be presumed that the defendants had submitted to the jurisdiction; but the Master of the Rolls says "A mere contract to refer disputes does not seem to me to amount for this purpose to a submission in fact to the jurisdiction of the arbitration here. The person so submitting may be under a contractual obligation to submit, but I do not think that he therefore can be considered to have actually submitted to the arbitration here so as to give an English court jurisdiction over him," and, as the Court of Appeal held, there was no statute or rule authorizing the service of such a proceeding out of the jurisdiction.

STATUTE OF FRAUDS—INTEREST IN LAND—AGREEMENT TO PAY A SUM IF INTEREST IN LAND ACQUIRED—STATUTE OF FRAUDS (29 CAR. 2, C. 3)—S. 4
—(R.S.O. c. 338, s. 5).

Boston v. Boston (1904) 1 K.B. 124, was a curious sort of case. A husband claimed to recover from his wife £1,400, under an agreement, whereby the wife agreed that if her husband would buy the residue of a lease of a particular house, she would pay him the amount expended in the purchase. The husband accordingly bought the lease; the wife set up as a defence that the contract was not in writing, and was therefore void under the Statute of Frauds, s. 4 (R.S.O. c. 338, s. 5). Wills, J., who tried the action, gave judgment in favour of the husband, and the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) affirmed his decision, holding that the contract was not within the Statute, because it created no obligation to acquire an interest in land, it was rather a contract of indemnity.

POST NUPTIAL SETTLEMENT—POWER OF REVOCATION WITH CONSENT OF TRUSTEES — PARTIAL REVOCATION CONSENTED TO SUBJECT TO OTHER PROPERTY BEING SETTLED—VOLUNTARY SETTLEMENT—"PURCHASERS FOR VALUE."

In re Parry (1904) 1 K.B. 129, although a bankruptcy case, seems to deserve attention. The bankrupt in 1899 by a post-nuptial deed settled property upon trust for himself for life and after his death upon trusts for his widow and children, with an ultimate trust, in default of issue, for his next of kin. The deed was subject to a power of revocation with the consent of the trustees. In 1902 the bankrupt applied to the trustees to consent to a partial revocation as to £1,600 of the trust property, which they consented to on the terms of the bankrupt settling other property, including his life interest under the deed of 1899, and also a reversionary interest to which he had since become entitled. The bankrupt agreed to this and assigned to the trustees his life interest under the deed of 1899 and the reversionary interest upon trusts which gave the trustees an absolute discretion to apply the income during his life for the benefit of the bankrupt or his wife or children, and subject thereto upon similar trusts as in the deed of 1899, with a like power of revocation. In September, 1903, the settlor was adjudicated bankrupt, and his assignee applied to set aside the deed of 1902, and the trustees resisted the

application on the ground that they were "purchasers for value" within s. 47 of the Bankruptcy Act, which avoids voluntary settlements made within two years before the bankruptcy, but Wright, J., held that they were not, and set aside the deed so far as necessary for the payment of the debts in the bankruptcy.

DEFAMATION—SLANDER—SPECIAL DAMAGE—DAMAGE TOO REMOTE.

Speake v. Hughes (1904) 1 K.B. 138, was an action of slander brought in respect of a statement made by the defendant to the plaintiff's employers to the effect that the plaintiff had removed from premises leaving rent due to his landlord, the plaintiff alleging that in consequence of such statement he had been dismissed from the service of his employers. The case was tried in the Liverpool Court of Passage and dismissed, and the Court of Appeal (Collins, M.R. and Mathew, and Cozens-Hardy, L.JJ.) affirmed the decision on the ground that the special damage alleged was too remote.

CRIMINAL LAW—FALSE PRETENCES—FRAUD—EVIDENCE OF PREVIOUS ACTS.

King v. Wyatt (1904) 1 K.B. 188, was a prosecution for obtaining goods by false pretences. The prisoner had gone to the prosecutrix's house and got her to receive him as a lodger and incurred a bill of 14 s. 6 d., which he was unable to pay. It was proposed to call witnesses to prove that the prisoner had been at an hotel and other lodging houses and in like manner incurred bills and left without paying. The evidence was admitted subject to an objection to its admissibility, and the prisoner was convicted. On a case stated the Court (Lord Alverstone, C.J., and Wright, Kennedy, Darling, and Phillimore, L.JJ.) held that the evidence was admissible as shewing a course of conduct on the part of the prisoner, and his conviction was affirmed.

WEIGHTS AND MEASURES—SCALES—WEIGHT INDICATED EXCEEDING TRUE WEIGHT—ACQUIESCENCE OF PURCHASER—"FALSE OR UNJUST"—WEIGHTS AND MEASURES ACT, 1878 (41 & 42 VICT., C. 49) S. 25—R.S.C. C. 104, S. 25.

In *London County Council v. Payne* (1904) 1 K.B. 194, the defendants, who were wholesale tea merchants, were summoned for having scales which were "false and unjust," contrary to s. 25

of the Weights and Measures Act, 1878 (R.S.C. c. 104, s. 25). The facts proved shewed that the defendants for the purpose of weighing tea to certain retail customers had affixed to one of the scales in question by a wire metal disc equal to the weight of a paper bag, for the purpose of weighing tea to be sold to such customers, the effect of which was to make the articles weighed in the scale appear to weigh more by the weight of the disc than the true weight. The disc was used with the knowledge of the customers who supplied the bags, and which bore a printed notice to the effect that the weight of the paper was included. The other scale instead of having a metal disc attached, had a paper bag placed under the scoop in which the tea was placed for weighing. The defendants had given directions to their servants not to use the scales with the disc or paper bag attached for any customers other than such retail dealers. The magistrate acquitted the defendants, but on a case stated the Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) held that the defendants had been guilty of using scales which were "false or unjust" within the meaning of the Weights and Measures Act, 1878, s. 25 (R.S.C. c. 104, s. 25) and ought to have been convicted.

LOTTERY—SWEEPSTAKE ON HORSE RACE—GAMING ACT, 1802 (42 GEO. 3, C. 119) S. 2—(CR. CODE, S. 205).

In *Hardwick v. Lane* (1904) 1 K.B. 204, the Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) held that a sweepstake on a horse race is an illegal lottery within the Gaming Act, 1802 (42 Geo. 3, c. 119) s. 2. (See Cr. Code s. 205)

CLUB—"PRIVATE DWELLING PLACE"—NUISANCE.

In *McNair v. Baker* (1904) 1 K.B. 208, it was held by the Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) that a house used by a club of 750 members, which had previously been a private dwelling house, and which, besides the usual accommodation of a club, had five bedrooms for the use of members, was not "a private dwelling place" within the meaning of an Act of Parliament relating to nuisances caused by smoke.

MERCHANT SHIPPING ACT—LIMITATION OF LIABILITY—SHIP—WATER BALLAST TANK.

The Cordilleras (1904) P. 90, may be noted as deciding that in the measurement of the tonnage of a vessel for the purpose of

limiting the liability of the owners under the Merchant Shipping Act, s. 503, the space occupied by water ballast tanks which are not capable of being used for the carriage of stores, cargo or fuel, may properly be excluded.

LETTERS OF ADMINISTRATION—COLONIAL PROBATES ACT, 1892 (55 & 56 VICT., c. 6)—LIMITED GRANT—RESEALING GRANT.

In the goods of Smith (1904) P. 114, an application was made to reseal colonial letters of administration under the Colonial Probates Act, 1892 (55 and 56 Vict., c. 6). The deceased, William Smith, was at the time of his death administrator of one George Smith, and the letters of administration to the estate of William Smith were limited to the property of George Smith in the hands of William Smith. The next of kin of William Smith consented to the application. The officers of the Probate Division declined to reseal the grant, but on application to Bucknill, J., he ordered the grant to be resealed notwithstanding its being limited in its terms.

CONVEYANCING—ASSIGNMENT OF MORTGAGE OF LEASEHOLD—"BENEFIT OF SAID MORTGAGE"—OPERATIVE WORDS—LEGAL ESTATE—TECHNICAL WORDS—INTENTION.

In re Beachey, Heaton v. Beachey (1904), 1 Ch. 67. The Court of Appeal (Lord Alverstone, C.J., and Williams and Romer, L.JJ.) decided that there was still some importance left in technical words and that an assignment of a mortgage of leaseholds whereby the assignor purported "to convey and transfer all the benefit of the said mortgage" to the transferee, was not sufficient to convey the legal estate in the mortgaged property.

WILL—CONSTRUCTION—"CHATTELS REAL"—RENT CHARGE ON LEASEHOLDS—UNPAID PURCHASE MONEY—INTESTACY NEXT OF KIN—REAL ESTATE CHARGES ACTS 1854 (17 & 18 VICT. c. 113), s. 1. AND 1877 (40 & 41 VICT. c. 34, s. 1)—(R.S.O. c. 128, s. 37.)

In re Fraser, Lowther v. Fraser (1904), 1 Ch. 111, two points were determined by Byrne, J. First, that a rent charge issuing out of leaseholds is a "chattel real"; and secondly, that where a testator dies intestate as to a chattel real which is subject to a lien for unpaid purchase money under the Real Estate Charges Act 1877 (40 & 41 Vict. c. 34), s. 1, (R.S.O. c. 128, s. 37) the next of

PARTNERSHIP—RECEIVER—INTERFERENCE WITH RECEIVER.

In *Dixon v. Dixon* (1904), 1 Ch. 161, the action was brought to wind up a partnership, and a receiver and manager of the business had been appointed with a view to its sale as a going concern. The defendant had, pending the suit, joined a rival business and had informed some of the old employees of the old firm that the business was to be sold and had invited them to give notice to terminate their employment and join the new business in which he was engaged. Three of the most important employees in consequence left the old and joined the new business after giving the requisite notice. The defendant had also endeavoured to secure for himself a lease of a field which had been in the occupation of the old firm. The plaintiff moved for an injunction to restrain the defendant from interfering with the receiver's management of the old business. Eady, J., held that the acts complained of were an interference with the receiver and granted an injunction, which looks like shutting the stable door after the horse is stolen. One would have thought the plaintiff's proper remedy would have been a motion to commit the defendant for contempt of court.

PATENT — INFRINGEMENT — COMBINATION — COMPONENT PART OF PATENTED ARTICLE—SALE—INTENTION

Dunlop Pneumatic Tyre Co. v. Moseley (1904), 1 Ch. 164, was an action to restrain an alleged infringement of a patent. The patent was for a combination and the defendants were manufacturers of one article which constituted one of the component parts of the patented combination. The plaintiff claimed that the defendants sold them to persons who used them for the purpose of combining them with other parts so as to infringe the plaintiff's patent, and that the defendant intended that they should be so used, and they claimed an injunction. Eady, J., dismissed the action on the ground that the manufacture and sale of the part in question was no infringement of the patent, and the fact that purchasers might possibly use them for the purpose of infringing the patent gave the plaintiffs no ground of action against the defendants.

HIGH COURT OF JUSTICE.

Street, J.] *FORBES v. GRIMSBY PUBLIC SCHOOL BOARD*. [Dec. 26, 1903.
Public schools—Requisition for funds—Requisites of meetings of board and council—Notice—Adjourned meeting of council—Scope of power at—By-law—Recital of amount of debt—Municipal Act, 1903, s. 386, s.-s. 1 and s. 384, s.-s. 5.

A public school board having called upon the Municipal Council of a village to raise \$12,500 for the purpose of building a school house, the council passed a by-law for the purpose of issuing debentures to the amount required. A ratepayer obtained an interim injunction restraining proceeding thereunder which injunction was dissolved on motion to continue. The school board subsequently passed a new resolution asking the council "to pass a by-law for the issuing of debentures to the amount of \$12,500 for the purpose of a school site and towards the erection of a school house thereon" which was presented to the council on the same day and the council repealed their by-law and passed a new one for the purpose. The plaintiff (the same ratepayer) then brought an action to have the latter by-law declared invalid (1) on the ground that the meeting of the school board at which the last resolution was passed was irregular because no notice was given to the members of the board of the object of the meeting, and (2) because the council had no power to pass the by-law as no notice had been given of the object of its meeting, and as it was an adjourned meeting, it had no power to transact any business which could not have been brought before it at the meeting of which it was an adjournment.

Held, that in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of any school board or municipal corporation should specify the business to be transacted. *The King v. Pulsford* (1828) 8 B. & C. 350 and *La Compagnie de Mayville v. Whitley* (1896), 1 C. 788, referred to and distinguished from *Marsh v. Huron College* (1880) 27 Chy. 605 and *Cannon v. Toronto Corn Exchange* (1880) 5 A.R. 268.

2. It was the duty of every member of the Council to be present at the adjourned meeting, and it was competent to the members present to transact any business which might have been transacted at the original meeting.

3. As the latter by-law was only passed to overcome certain defects in the earlier one, it might well have been passed without any new requisition from the school board.

4. The by-law sufficiently recited the amount of the debt intended to be created as it recited that application had been made by the school board to the council to raise the sum of \$12,500 by the issue of debentures, and it authorized the issue of debentures to that amount.

f s. 386 of the Municipal Act of 1903 authorized the issue
viding for the payment of principal and interest together
nts spread over the whole period for which the debent-
nd is alternative to the provisions of sub-s. 5 of s. 384 of

., and *Pettit*, for plaintiff. *Lynch-Staunton*, K.C., for
ndyke and Lipset. *D'Arcy Martin*, for Corporation of

MacMahon, J., Teetzel, J.] [Jan. 22.

LAWRENCE STEEL AND WIRE CO. v. LEYS.

rety—Guarantee—Construction of—Future indebtedness.

the defendant from the judgment of STREET, J., reported
is argued before a Divisional Court on Jan. 20 and dis-

l.
C., for appellant. *Watson*, K.C., contra.

MacLaren, J.A., MacMahon, J.] [Mar. 3.

BURDETT v. FADER.

*for disposing of his property—Status of creditor—Verdict
for damages—Fraud.*

by the plaintiff from the judgment of BOYD, C., reported
argued on the 3rd March, 1904, before a Divisional Court,
ve.

dismissed the appeal with costs.

, for appellant. *O'Connell*, contra.

son, J., Meredith, J.] [Feb. 1.

L'ABBE AND CORPORATION OF BLIND RIVER.

*ration—By-law—Reduction of number of liquor licenses—
of Reeve—Pecuniary interest in licensed premises in muni-*

n an order of the senior judge of the District Court of
ing an application to quash a by-law of the municipal
g the number of liquor licenses on the ground that the
ose casting vote the by-law was passed, had a pecuniary
sult of the reduction of the number of licenses.

pality contained a population of 583 people. There had
a former year a by-law allowing three liquor licenses for

taverns to be issued for the locality, which remained in force in 1903. As a matter of fact only two licenses had ever been granted at any time, and in 1903 these licenses were held, one for a tavern owned by the brother of the Reeve, and the other for a tavern which was held under mortgage by the Reeve. The by-law objected to purported to repeal the by-law allowing three licenses and limit the number to two. The members divided equally and the matter was carried in favour of the new by-law by the casting vote of the Reeve.

Held, that the effect of the by-law in question would be to prevent the license commissioners granting more than two licenses, and it was fairly to be inferred that the licenses would go in continuation of the existing licenses and to the exclusion of the present applicant, who had completed the building of a large boarding house with the view of obtaining a liquor license. The vote of the Reeve in effect secured the renewal of the license to the tavern held by him under mortgage and cut out any chance of a competitor who might share the profits of the mortgaged tavern, and otherwise impair the value of his security, and therefore it could not be said that there was an absence of direct pecuniary or proprietary interest in the Reeve in the matter of his casting vote, and his vote should not be allowed to bring about a result so likely to be favourable to himself.

It appears to be a question of fact in administration of public trusts whether the person voting in the exercise of the trust has such a disqualifying interest as should estop him from taking part and as should nullify his vote.

Appeal allowed and impeached by-law quashed.

Middleton, for appellant. *Grayson Smith*, for corporation.

Boyd, C.] IN RE McCRAE AND VILLAGE OF BRUSSELS. [Feb. 13.
Municipal corporation—Local improvement by-law—Absence of personal notice—Actual notice—Motion to quash.

Held, that the provision in s. 669 (i.a.) of Municipal Act, 3 Edw. VII., c. 19, as to giving personal notice of a projected local improvement to the parties whose property is to be included is directory only; and in this case in which it appears that the applicants were well aware all the while from the outset as to what was intended, a motion to quash a municipal by-law providing for a local improvement on the ground of the absence of such personal service was refused.

Held, also, that the objection that the members of the Court of Revision were not sworn, could not be entertained on such motion, because the members of that court had not been called upon to uphold their action, and because the applicants went before the court on appeal and were unsuccessful.

Proudfoot, K.C. for plaintiff. *Sinclair*, K.C., for defendants.

GENERAL SESSIONS OF THE PEACE—COUNTY OF YORK.

Winchester, Co. J., Chairman.]

[Feb. 23.

REX v. GOODING.

Conviction under by-law—Appeal—Drainage and water system of buildings—Construction, reconstruction or alteration, in respect of same—Repairs—Meaning of terms.

The defendant had been convicted by R. E. Kingsford, one of the Police Magistrates for the City of Toronto, of having, contrary to a by-law of the municipality directing that "before proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water system of any hotel, warehouse, dwelling-house, or other building, the owner, or his agent, desiring to construct the same, shall file in the office of the Medical Health Officer an application for a permit therefor." The by-law further obliged any master plumber, or workmen, engaged by the owner to discharge work of such description to satisfy himself before commencing it that the permit had been so filed. Penalties were enacted for violation of the by-law.

The offence sought to be established by the prosecution was that of "reconstructing or altering" the drain leading from water-closet by removing 8 feet or so of pipe and replacing this by two new lengths, the sides afterwards filled in with earth. Besides this operation the old hopper which had become impaired by use, was taken out and a fresh one erected.

Held, quashing the conviction, that the work performed should not be treated as "construction, reconstruction, or alteration," but consisted of "repairs," for which a permit was not requisite. *Hoddinott v. Newton & Co.* (1901) A.C. 49, considered and approved.

B. N. Davis, for appellant. *W. C. Chisholm*, for respondent.

Winchester, Co. J., Chairman.]

[Feb. 23

REX v. SABINE.

Summary conviction—Appeal—Lord's Day Act, R.S.O. c. 246,—Eating house license—Sale of "Ice-cream soda."

The defendant was convicted by R. E. Kingsford, one of the Police Magistrates for the City of Toronto, "for that he, being a tradesman," etc. (following here the words of s. 1 of the Act) by, among other things, selling and exposing and offering for sale, or authorizing clerks and salesmen to sell, etc., certain glasses of a beverage known as "Ice-Cream Soda." It appeared from the facts that the appellant held a victualling house license, for the year ending December 31, 1903, applying to 168 Queen St. west.

He said there were tables of different capacities for guests, at which meals, such as ham and eggs, meat, etc., were served, if called for, but admitted that the front part of the store was used for trade in candies, and that such was the main business carried on; though he kept plates, saucers and knives on hand, and sold oysters when they were in season. He swore that he confined his dealings on Sundays to ice-cream and eatables. He did not put table cloths, nor knives and forks on the tables, but said they were available. Witnesses stated that they had often looked in at the place, when passing, but never saw anything but candies and ice-cream or ice-cream soda there. One declared that he was not able, on request, to get a meal at one time.

The ice-cream soda was made up of cream, sugar, flavor, and soda, carbonated.

The offence was not committed by the appellant personally, but he confessed to having girls employed in the store to wait upon customers.

Held, 1. On the authority of *Sieman v. Commonwealth*, 21 Am. Law Reg. 245, which refers to *Reg. v. Bleasdale*, 2 C. & K. 764, that appellant was liable for the wrong of his servant acting in the course of his employment.

2. The business of the appellant not being exclusively that of a victualler, the sale of the article in question was illegal.

Robinette, K.C., for the appellant. *W. C. Chisholm*, for the respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

REX v. BURKE.

[Jan. 13.

Canada Temperance Act—Informations for similar offences pending at same time—Conviction quashed.

Defendant was summoned to appear before the stipendiary magistrate of Sydney, C.B., to answer to two informations for selling intoxicating liquor in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases and both cases were then adjourned until a subsequent day when judgment was given convicting defendant under one information and dismissing the other.

Held, that the conviction must be quashed, the magistrate having heard evidence in both cases and had them pending before him when he

made the conviction, and the evidence in the one case, although dismissed, being calculated, under the circumstances disclosed, to influence the magistrate in the case in which defendant was convicted.

R. v. McBerty, 26 N.S.R. 327 followed.

Weatherbe, J.] HENNIGAR, ASSIGNEE *v.* BRINE. [Feb. 5
*Collection Act—Fraudulent disposition of property—Appeal from order of
examiner dismissed with costs—Refusal to execute assignment—
Imprisonment ordered for.*

A judgment was recovered against one of the defendants, G.B., on Jan. 31, 1901, for \$37.91, debt and costs, and remained unsatisfied, which at the date of the commencement of the examination hereinafter mentioned, amounted to \$50.32. On Dec. 29, 1903, the defendant, G.B., entered into a recognizance for \$45 as surety for his brother J.T.B. in the Police Court at Halifax on appeal from a summary conviction, and justified on oath as being worth "\$45 over and above all his debts" in personal property, which consisted of household furniture, including the above judgment and another judgment had against him by L. & T. for \$65.19, and which two judgments were specifically brought to his notice at the time he was justifying as bail under oath. An execution was issued on the first mentioned judgment on the following day, and the sheriff acting under it, on Jan. 3, 1904, demanded from the defendant the personal property on which he justified, to which G.B. replied that he had sold it to his brother N.B. who took possession of it two days before for \$60, which he gave to his wife for the purpose of buying household supplies, etc. The defendant was shortly afterwards examined under the Collection Act in respect of this judgment. The above facts were proved on the examination, but the disposition of the \$60, the proceeds of the sale of G.B.'s personal property to his brother N.B., was not satisfactorily accounted for to the examiner; it further appeared that shortly after the recovery of this judgment against the said G.B., but before it was recorded, he mortgaged his realty to a building society for \$400, and subsequently conveyed by absolute deed the equity of redemption for another alleged loan of \$400 to his father-in-law, whose heirs without any consideration conveyed said equity to defendant, G. B.'s wife. The defendant G. B. remained in possession of the realty which was assessed in his name, paid the taxes on it, and did not know whether the alleged loan from his father-in-law was paid off by his wife or not. He afterwards himself paid off the mortgage to the building society.

The examiner made an order under the Collection Act, s. 27 (e) against the defendant G. B. committing him to jail for two months for a fraudulent disposition of his property, or until he should pay \$61.42, the amount due on the judgment. On appeal to Weatherbe, J., at Chambers,

Held, 1. The examiner was fully justified in making the order for imprisonment and the appeal should be dismissed with costs.

2. Where the debtor refused to execute the assignment mentioned in s. 28 of The Collection Act, and the judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be only taken into consideration by the officer or judge in fixing the term of imprisonment.

H. Mellish and J. L. Barnhill, for appellant. *J. J. Power*, for respondent.

Townshend, J.] HENNIGAR v. BRINE. [Feb. 16.

Collection Act—Bond to appear on hearing of appeal—Action for penalty under—Damages to be assessed—O. 3, rr. 5 and 6.

One of the defendants, G.B., appealed to a Supreme Court judge in Chambers from the examiners' adjudication referred to in *Hennigar, Assignee, v. Brine*, supra, and gave a bond in the sum of \$61.42, required by s. 32, of the Collection Act, conditioned personally to appear before the judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and, for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant, G.B., and his sureties for the penalty of \$61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside on the grounds (a) that, being for a debt or liquidated demand, the writ should have been specially endorsed under order 3, rule 5, and (b) that the writ, in any event, should have been endorsed with the usual claim for costs under order 3, rule 6, citing *Murray v. Kaye*, 32 N.S.R. 206.

Held, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one in respect to which damages must be assessed. *Sloman v. Walter*, 2 W. & T., Leading Equity Cases (Blackstone ed.) page 1267; Leake on Contracts, 3rd ed., page 122; and *Tuther v. Caralampi*, 21 Q.B.D. 414, referred to.

J. M. Davison, for motion. *J. J. Power*, contra.

Weatherbe, J.] IN RE GEORGE BRINE. [Feb. 19.

Habeas corpus—Arrest of witness while returning from giving evidence—Detention under order of punitive and quasi criminal character—Motion for discharge refused—Remedy.

The applicant, G.B., was arrested at the City of Halifax, at which place he resided, by the sheriff of the County of Halifax, under the order of Weatherbe, J., referred to in *Hennigar, Assignee v. Brine*, supra, on

1904, while he was going to his place of business and returning to home, about three-quarters of an hour after he had left the police station at Halifax where he had attended to prosecute and give evidence as a necessary and material witness for the Crown, in a prosecution instituted by himself the previous day, for an aggravated assault committed on Feb. 6, 1904. On a motion to discharge the prisoner from custody by the Sheriff, to an order made by Graham, E. J., in the nature of a writ of *habeas corpus*, under R.S., c. 181, "of securing the liberty of the subject," returned the above order of Weatherbe, J., as the cause of the prisoner's detention. The grounds of the motion were (a) the prisoner's release from arrest while returning from giving evidence in Court, and (b) the excessive fees indicated in the margin of the judge's order.

Id., 1. Dismissing the application, that, under all the circumstances, the judge's order was of punitive and quasi-criminal character, the applicant as a witness was not privileged from arrest under it. Sec. 242 Criminal Code, *Gibbs v. Phillipson*, 1 R. & M. 19, and *Re Gent*, D. 190, referred to.

The order was one that could not be impeached under habeas proceedings. *MacKay v. Campbell*, 39 C.L.J. 486; *Re Sproule*, R. 140; *R. v. Beamish*, 5 C.C.C. 388, referred to.

In view of s. 37 of the Collection Act, which makes the judgment of the judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due, or to sue for a penalty for taking excessive fees provided by R. S. c. 185, s. 2, but in any event, under s. 40 of the Collection Act, even if the application lay, as the evidence taken upon the examination showed there was ground for making this order, the application should be dismissed. *R. v. Doherty*, 3 C.C.C. 505; 32 N.S.R. 235; *R. v. Mordock*, C. 82; 27 A.R. 443; *R. v. Spooner*, 4 C.C.C. 207; 32 O. R. 451, referred to.

M. Davidson, for applicant. *J. J. Power*, contra.

COUNTY COURT DISTRICT No. 6.

Willivray Co., J. RE ARCHIBALD. [Sept. 21, 1903.
Partition—Dower—Merger—R.S.N.S. 1900, c. 140, ss. 3, 4 (1) and 16.

Samuel Archibald died intestate, leaving two sons and one daughter to whom his real property descended as tenants in common. Before partition the sons died intestate, leaving a widow but no issue. The Act as to descent of real property provides: Sec. 3. "If the intestate leaves no issue, one-half of his real property shall go to his father and the other half to his widow in lieu of dower, and if there be no widow the whole shall go to his father."

Sec. 4 (1). "If the intestate leaves no issue nor father, one-half of his real property shall go to his widow and the other half in equal shares to his children."

his mother, brothers and sisters, and the children of any deceased brother or sister by right of representation."

Sec. 16. "Nothing in this chapter contained shall affect the title of husband as tenant by the curtesy, nor that of a widow as tenant in dower."

On proceedings under the Probate Act for partition of the real property the widow of the deceased son claimed, in addition to one-half of her late husband's share in fee one-third of the other half as tenant in dower, contending that as the words "in lieu of dower" were not repeated in sec. 4 (1) that under s. 16 dower in her case is not affected. On a special case stated,

Held, that the widow had no right of dower in the half assigned to the brother and sister. "The law casts the freehold on the heirs immediately on the death of the ancestor." "Until assignment of dower the widow has no estate and only a right of dower." (Smith on R. & Per. Pr., 3rd ed. p. 193). On the death of S. Archibald his children took the whole estate as tenants in common. The share of one of his sons (who died after his father) is set apart in the partition. This share goes one-half to the widow the other to the brother and sister in equal shares; and they all held those shares before partition by unity of possession. The inferior life estate of the widow—inchoate life estate—is therefore absorbed in the higher life estate and entirely disappears. Following the doctrine laid down in Freeman on Co-Ten. & Part. s. 108, it was held that the widow was tenant in common with the brother and sister; and on partition between them she takes one-half in fee and they take the other half in fee. Hence there is no right of dower remaining which the widow can claim.

The reason of expressly saving dower under s. 16 is declaratory only of the widow's common law right in case the lands descended to an intestate's children; or it may be intended to save her dower in case the real estate of an intestate were sold by license to pay his debts.

H. T. Harding, for the widow. *W. Chisholm*, for brother and sister.

Province of Manitoba.

KING'S BENCH

Full Court.]

CAMERON v. DAUPHIN.

[Feb. 1.

Public Health Act, R.S.M. 1902, c. 138, ss. 32, 67, 95, 101, 102—Liability of municipality for services of physician and nurse employed by health inspector to take care of a smallpox patient.

Appeal from verdict of a County Court Judge in favor of plaintiff who sued the defendant municipality for payment for his services as physician and nurse in attending, by direction of the district health inspector, upon a

pox patient in quarantine. On the breaking out of the disease in the the district health inspector, appointed under "The Public Health R.S.M. 1902, c. 138, visited the town and decided to remove the y affected with the disease, and the patient was isolated and ntined in a house selected by the local health officer and mayor. nspector then requested the plaintiff to take charge of the quarantine edical attendant and nurse, and told him the amount of remuneration ould be entitled to, viz., \$15 per day. He remained in charge for n days. The town paid the other expenses but declined to pay the iff, although the inspector gave him a certificate of the services g been performed and of the amount earned.

By s. 67 the health officer of the municipality may make effective sion, in the manner which to him may seem best, for the public y, by removing such person to a separate house or by otherwise ing him if it can be done without danger to his health, and by ding nurses and other assistance and necessities for him at his own and charge, or the cost of his parents or other person or persons e for his support if able to pay for the same, otherwise at the cost and e of the municipality. By s. 32 the health inspector shall have in istrict, and in every municipality therein, all the powers conferred by Act upon health officers, and may, when he deems it necessary, nd, supersede or act in the place of the health officer and other local ls and give such orders or directions as he deems necessary. By s. e orders, directions or certificates of the inspector have the like force ffect as those of the local health officer and mayor or reeve, and he en power to annul the orders of the local officials, who shall have no r to make any order inconsistent with that of the inspector.

By s. 95, when any person is unable through poverty to comply with provisions of the Act, he may so notify the health officer and the y may then give a certificate which shall be a bar to all proceedings st such person for six months.

In view of the above provisions and also of ss. 101 and 102 of the the municipality in such a case is primarily liable for the expenses red in caring for such patients in quarantine, and it was not sary for plaintiff to prove that he could not recover from the patient om his parents or other person or persons liable for his support.

e. It was unnecessary to decide whether the plaintiff could recover hysician for he had acted as nurse, and the amount certified for his es as such was not unreasonable under the circumstances.

e. It was competent for the inspector to engage the plaintiff without g first suspended or superseded the local health officer.

The matters dealt with in the portions of the Act referred to are of ng necessity and require prompt action in the interest of the persons ed and of the public health, and if the municipality were not ed to pay the expenses incurred under the Act until proceedings had

been taken against the individuals liable and until it was shewn that such proceedings would be unsuccessful, thus involving a delay of perhaps many months, it would be difficult, if not impossible, to secure the prompt services of nurses or physicians or to procure necessary food, medicines and supplies, and such could not have been the intention of the Legislature in passing the Act.

Appeal dismissed with costs.

Wilson, for plaintiff. *Aikins*, K.C., for defendant.

Full Court.]

SPEIGHT WAGGON CO. v. CURRIE.

[Feb. 1.

Executions Act, R.S.M. 1902, c. 58, ss. 24-27—Extension of time for creditor to get judgment in order to share in distribution by sheriff—Power of judge to alter, vary, or add to his own order—Power to rescind his own order—King's Bench Act, R.S.M. 1902, c. 40, s. 58, R. 438, 638.

The sheriff, having realized certain moneys under executions against the defendants, gave, on Nov. 8, 1902, the notice required by R.S.M. 1902, c. 58, s. 25, which requires him to delay the distribution of the money for three months, to enable other creditors to get judgment, and place their executions in his hands, and then to distribute the funds in his hands among all persons having unsatisfied executions in force in his hands at the date of distribution. Sec. 27 provides that, in case any person, to whom the same debtor is justly liable for any debt or liquidated demand, or such a demand as would have been the subject of a former action, upon the common or money counts, is unable, for any reason which he cannot by due diligence overcome, to obtain judgment against the said defendant, a Judge of the Court of King's Bench may order the distribution by the sheriff to be wholly or partially delayed, as may seem just for a further period. Under this provision the plaintiffs, on Feb. 7, 1903, on notice of motion which was served only on the sheriff, obtained an order in chambers from Mr. Justice Richards that the sheriff should delay the distribution of the money until March 30; but the order provided that any interested party might move to vary, or rescind it, within two weeks after the service thereof on the sheriff. This service was made on Feb. 9. On March 13, following, Merrick Anderson & Co., on whose writs of execution the sheriff had realized the moneys referred to, on notice of motion given by special leave of the same judge, obtained from him an order that the one made by him, on Feb. 7, delaying the distribution, should be set aside, with costs to be paid by the plaintiffs, on the ground that they had not used due diligence in obtaining judgment. On April 20, following, Merrick Anderson & Co. obtained a further order from the same judge, directing that his order of March 13, should be amended, nunc pro tunc, by adding a clause thereto that the sheriff should have no regard to the

execution issued by the plaintiff on Feb. 8, and that he should distribute the moneys among those entitled to share in them on Feb. 8 withholding the plaintiffs any part thereof. The plaintiffs appealed against last mentioned orders.

Id. 1. Since the passage of s. 58 of The King's Bench Act, R.S.M. an order of a single judge cannot be set aside, varied, amended, or rescinded, except on appeal to the Court in banc, unless the case comes under the provision of Rule 638, that clerical mistakes in judgments and orders or errors arising therein from any accidental slip, or omission, may, at any time, be corrected by the Court, or judge, on motion without an adjournment, and, therefore, the order of April 20, barring the plaintiff from the execution was made without jurisdiction, and should be set aside. *In re Bank of Montreal and Watts*, 20 Q.B.D. 693, and *Preston Banking Co. v. Allsup*, 141 A.C. 141, followed.

Under Rule 438, which provides that any party affected by an order, except the party issuing the same, may move to vary, or rescind, the order within four days, from the time of its coming to his knowledge, or within such further time as the judge may allow, it was competent for the judge to make the order of March 13, rescinding his order of March 10, as that order, having been obtained without notice to Merrick Anderson & Co., should, as regards them, be considered as an *ex parte* order, and, although Merrick Anderson & Co. had not applied within two days, or within four days, from acquiring a knowledge of it, the judge had power to grant such further time, as provided for by that Rule; that there was no sufficient reason for interfering with the discretion exercised by the judge in making the order appealed against; and that it should stand.

A creditor having no other cause of action than one based on a debt yet due and payable, has no right to apply, under s. 27 of the Companies Act, for an order delaying the distribution by the sheriff. No order made in favour of either party.

Mullock and McPherson, for plaintiff. *Mullock*, K.C., for Merrick Anderson & Co.

[Court.] **BRYDGES v. CLEMENTS.** [Feb. 1.

Real estate agent—Commission on sale of land—Right to commission when sale falls through—Amount payable in that case.

After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question, on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the property, on the property, was out of plumb, and slightly overhung the adjoining lot, and called on the defendant to make good the title to the property, which formed part of the property bought. Being unable, or unwilling, to make good the defect in title, or to make satisfactory terms

with the owner of the adjoining lot, defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly.

Held, following *McKensie v. Champion*, 4 M.R. 158; *Wolf v. Tait*, 4 M.R. 59; *Brickett v. Badger*, 1 C.B.N.S. 296; *Roberts v. Barnard*, 1 C. & E. 336, and *Fuller v. Eames*, 8 T.L.R. 278, that plaintiffs had earned and were entitled to be paid a compensation for the services in finding a purchaser, not necessarily the amount agreed upon as commission, but a compensation as a quantum meruit, or by way of damages, and that, under the circumstances, it was competent for the trial judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through.

Held, also, following *McKensie v. Champion*, that plaintiffs were entitled to be paid, notwithstanding the fact that the plaintiffs had not procured the purchaser to execute a binding agreement of purchase.

Munson, K.C., and *Laird*, for plaintiffs. *Aikins*, K.C., and *Monkman*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] HARRY v. PACKERS' STEAMSHIP CO. [Jan. 25.

New trial—Misdirection—Judge's comments on evidence.

It is not misdirection for the judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the judge stated that he himself would pay very little attention to certain corroborative evidence adduced by defendants, but he also told them that the matter was entirely for them to decide.

Held, not misdirection. Appeal from judgment of IRVING, J., dismissed.

Wilson, K.C., Atty.-Gen., for appellant. *D. G. Macdonnell*, and *L. B. McLellan*, for respondents.

Hunter, C.J.] WILES v. TIMES PRINTING AND PUBLISHING CO. [Jan. 29.

Practice—Notice of trial—Rule 340.

Summons to dismiss action for want of prosecution. On Jan. 13 plaintiff's solicitors gave notice of trial at the July sittings to be held in Victoria, where, according to statute, sittings are also held in February, March, May, October and December. This was a libel action and the

was in Pennsylvania engaged in organizing theatrical entertain-
and had so arranged her engagements that for her to leave there
June would entail great loss.

Id., that to give a notice of trial for the 4th sitting after the date of
is an abuse of the process of the court and the plaintiff was
to go to trial in March, otherwise the action to stand dismissed.

H. Lawson, Jr., for the summons. *Cassidy, K.C.*, contra.

Book Reviews.

Principles of the Common Law, by John Indermaur, Solicitor, 10th ed.,
the author and Charles Thwaites, Solicitor. London: Stevens &
Haynes, Law Publishers, Bell Yard, Temple Bar, 1904. Pages, 598.
Price, \$.

The first edition of this well-known book was written mainly with a
view to the examinations of the Incorporated Law Society, as to which the
author had large experience in reading with students. That was in 1876.
The first edition went out of print in a little more than two years, render-
ing necessary the present 10th edition. We may well believe that "no
effort has been spared to bring the work thoroughly and completely up
to date." We need say no more about such a well-known book.

Institutes of Justinian Libri Quatuor, with introductions,
commentary, and excursus, by J. B. Moyle, D.C.L., of Lincoln's
Inn, Barrister-at-law: Oxford, at the Clarendon Press, London;
Henry Frowde, Amen Corner, and Stevens & Sons, Limited, 119 & 120
Aldersgate Lane, 1903.

For the purposes of beginners Sandar's edition of the Institutes may be
suitable than Dr. Moyle's, but in point of learning all competent
will agree that Dr. Moyle's Institutes is *facile princeps* of all editions by
any annotators. It is not too much to say that it is an honor to Oxford
University that one of its sons should have produced such an edition of the
Institutes in a country in which the Civil Law does not prevail. Sohm's
Institutes of Roman Law, admirably translated as they have been by Mr.
Moyle, can never supersede Dr. Moyle's work.

The historical introduction and the excursus upon such subjects as
Property, Possession, Agency, and the early history of Roman Civil Pro-
cedure, with the frequent and apt citations from the Digest contained in
the notes, are especially valuable features of this book; and the introduc-
tion, excursus, and notes have been carefully revised.

We observe that in his note to this edition Dr. Moyle specially refers
to Professor Girard's *Manuel Élémentaire de Droit Romain*, and cites that
work from time to time in his notes. Dr. Moyle says of it, that it is "A

masterly treatise which it is much to be desired should have been translated into English." We are glad to be informed that a member of our own bar, Mr. Lefroy, Professor of Roman Law in the University of Toronto, having obtained special permission from Professor Girard to translate his manual in whole or in part, has completed his translation of the *Historial Introduction*, comprising the first Book of Professor Girard's work, and it will shortly be published.

Courts and Practice.

EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 55th section of "The Exchequer Court Act," as amended by 52 Vict., c. 38, s. 2, it is hereby ordered that the following Rule in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada :

1. An application to have any entry in any register of copyrights, trade marks or industrial designs, expunged, varied or rectified, may be joined with or made in an action for infringement.

(1) By the plaintiff in his statement of claim, where such entry has been made at the instance of the defendant, or some one through whom he claims, and the plaintiff is aggrieved thereby ; or

(2) By the defendant by counter-claim, where such entry has been made at the instance of the plaintiff, or some one through whom he claims, and the defendant is aggrieved by such entry.

Dated at Ottawa, this 7th day of March A.D., 1904.

Signed, GEO. W. BURBIDGE,
J.E.C.

The Recognition of Panama.—Theodore S. Woolsey LL.D. Professor of International Law in the Yale Law School discusses the action of the Government of the United States in reference to the recognition of Panama and its results, in the January number of the *Green Bag*, and comes to the following conclusions:—(1) The hasty recognition of a new State in Panama was not in accordance with the law of nations. (2) To justify it by the Treaty of 1846 requires a new and forced construction of that instrument. (3) To prevent Columbia's coercion of Panama is an act of war. (4) The "man in the street's" verdict that smart politics served Columbia right, disregards law, sets a dangerous precedent, detracts from the national dignity, and may injure our influence and trade amongst the Latin-American States. (5) Our duty was and is to let Columbia recover Panama if she can ; our policy, to use her troubles to get favourable canal action from the rightful sovereign. (6) Our recognition, if persisted in, makes of Panama a treaty making agent, but for ourselves only. (7) The canal treaty, negotiated and ratified by the Junta, with no constitutional authority or other authorization, is of doubtful validity and the defect will need to be subsequently cured.

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NO. 7.

Some of the long-expected appointments to the new Exchequer Division of the High Court of Justice of Ontario have been made. Mr. John Idington, K.C., of Stratford, and Mr. F. A. Anglin, K.C., of Toronto, are to be the puisne judges; the Chief Justice has not yet been appointed, and presumably cannot be until the resignation of Mr. Justice Robertson has been accepted, as there are still the statutory number of twelve judges on the roll of the High Court Bench. There are many excellent names mentioned for the position of Chief Justice, but as yet there is no indication as to who will be selected.

The appointments that have already been made meet with general acceptance by the Bar. Mr. Idington and Mr. Anglin are both good lawyers and stand well in the opinion of their professional brethren. The former has long been a leader of the Bar in his own county, holding an honorable position both as a professional man and as a citizen. Mr. Anglin is a much younger man in the prime of life—and has in the ordinary course of things a long life of usefulness before him. Though he has not yet become one of the leaders of the Bar, he has had a good legal education and a sufficient experience. He is painstaking, industrious, and clear headed, with an ambition to fulfil any duties entrusted to him to the best of his ability. We look for excellent judicial service from both of them.

Mr. Idington was born near Morriston, in the Province of Ontario, on October 14th, 1840. Graduating at the University of Toronto in 1864, he was called to the Bar in 1864. Since then he has practised law in the town of Stratford, where he soon acquired a large business. In 1876 he was made a Q.C. for Ontario, and in 1885 for the Dominion. He was appointed Crown Attorney for the County of Perth in 1879. He

has been for many years a Bencher of the Law Society of Upper Canada. Mr. Anglin comes from St. John, N.B., where he was born in April, 1865. He was educated at Ottawa, and called to the Bar in Hilary Term 1888, taking honors and a medal in his final examination. He was appointed Q.C. in 1902. He is not unknown as an author, having in 1900 published a very useful book on the limitation of actions against trustees and relief from liability for technical breaches of trust.

It is with feelings of pleasure that we record from time to time the appointment of able lawyers to non-legal positions. Among the most recent of these are of the late Speaker of the House of Commons, Hon. L. P. Brodeur, K.C., to be Minister of Inland Revenue, and Mr. N. A. Belcourt, K.C., to be Speaker, in place of Mr. Brodeur. The Hon. Mr. Belcourt, who is now the First Commoner, is well known as an able lawyer, versed in both French and English law, and commands equally the respect and confidence not only of his confrères but also of the public, whether of English or French descent. We believe that he will be a worthy successor to the capable men who have usually filled that high office, and that his decisions will be judicial and given with the fair-mindedness which has characterized his career.

From a variety of sources we gather that our remarks as to the Alaska Boundary Commission have been received with commendation and approval. The *Law Notes*, one of the most readable and thoughtful of the legal periodicals of the United States, makes some comments on the case which evince a breadth of view and a generous spirit of fair play which we thoroughly appreciate and gladly acknowledge. The writer says: "It may do us no harm but much good to try as an honourable people to see the matter as the Canadians see it. The man who can honestly put himself in his opponent's place generally gets a good deal of light upon the questions at issue."

The charges contained in the articles which appeared in this Journal, and in the papers from the pen of Mr. Thomas Hodgins, K.C., are then referred to, and a very fair presentation given of

also be conferred on him. But assuming the Master to have been correct in his view that at present he has no such jurisdiction, it may be asked what was the object in expressly making him an officer of the Supreme Court if it was not that he should have jurisdiction in both divisions of the Supreme Court. But in any case should the motion have been dismissed, having regard to Rule 784 which requires that motion made to a wrong court shall be transferred to the right one. Rule 3 would seem to require that, by analogy, that Rule should apply not only to motion to the court but also to judicial officers.

Some of our legal contemporaries in the United States are not unnaturally exercised over the condition of things connected with the condition of judicial matters in Montana. One writer remarks: "It is doubtful whether any body of judicial officers since the world began has been so persistently involved in charges of corruption as have the judges of Montana;" and that the ownership of every member of the judiciary by one or other of certain large corporations is a subject of common conversation and report. The State legislature also comes in for well merited rebuke for the enactment of a provision which, as an aid to the perversion of justice, it would be difficult to duplicate. It entitles either party to a suit, whether there is a bona fide defence or not, to file an affidavit that he has reason to believe that he cannot have a fair and impartial trial before the district judge by reason of the bias or prejudice of such judge. This affidavit may be made by the party or his attorney or agent. Upon the filing of the affidavit the judge shall be without authority to act. The case must then go to some other judge, and the dodge can be again and again repeated, provided, however, that no more than five judges can be disqualified for bias or prejudice at the instance of a plaintiff and no more than five at the instance of the defendant. Montana must certainly be a paradise for debtors, and it is not surprising that creditors occasionally "take it out of their hides" in an unlawful fashion.

AN "AMERICAN" LAW BOOK.

There was a time when we felt distinctly aggrieved at the appropriation by the people of the United States of the exclusive use of the term "Americans;" but that was before the Dominion of America had begun to loom so largely in the eyes of the nations of the world to-day. Primarily, of course, we citizens of Canada must assert as good a right to the term as our cousins across the border; but the name "American" at the beginning of the twentieth century is not the symbol of

"the New World's best
In doing and in character,"

It was at the beginning of the nineteenth century, and, therefore, we are not loath to let Dr. Murray in his monumental work in the new Oxford dictionary, finally deliver up this adjective with the flavor of "shirt sleeve" ethics, to the exclusive use and appropriation of the denizens of the neighbouring republic. "Canada" is a good enough name for us with which to confront a future big with promise of achievement, a future of which the present is a sure pledge or token.

The foregoing reflections have been induced by our happening upon an "American" law-book entitled: "A Treatise on Commercial Law and Business Customs, by Andrew M. Hargis, of Grand Island, Nebraska." If such a book had to be written at all, we are glad the Fates decreed that it should be the product of an "American" author—but that is the only cause for gladness we can find in it. True the Canadian output of legal literature is small, but this book would not have enriched it, although there's "something in it," as Mr. Squeers would say. In one respect the book is especially notable. In his preface the learned author says, with a modesty that is the only "un-American" thing in the volume, "No particular claim is laid to originality in this work, yet it is the most original alleged law-book that ever was written." There never was anything like it from the day of the beginning of the world until the day of the date thereof.

We have only space for one or two quotations, but it is a case for the sage's counsel: "Ab uno disce omnes" applies with particular force. Take this from the first chapter:—"Law may be divided into four separate classes: Moral Law, Natural Law, International Law and Municipal Law (*Mu-nis-i-pal*)" (sic). From this it is gleaned that Grand Island, Nebraska, has not only given to the world a philosopher of the law, but an orthoepist as well. As the book is avowedly written as "a text-book for use in schools and

colleges," the author feels it necessary to laboriously instruct the students in "American" halls of learning how to pronounce English words in common use. But let us hasten on to our author's definition of the Moral Law. "Moral Law has reference to that portion of the Old Testament which relates to moral principles, especially the ten commandments." Really, after this deliverance we dislike to refer to the learned author as plain "Mister Hargis." As he is not a professional humorist, he doubtless holds a doctor's honorary degree in philosophy, or medicine, or law—it doesn't matter which—from some one of those "schools or colleges" in Grand Island, Nebraska, "America," for the students of which this interesting treatise was avowedly written.

We have room for only one more passage, and we quote it as the author wrote it: "Natural Law has been defined as an unwritten law depending upon an instinct of the human race, universal conscience and common sense. [Shades of Grotius, and his *jus naturale*!] It may also be said to be the law which regulates the forces and processes of the material world." This "definition" would be reliable but for two objections. In the first place, no legal writer has ever yet defined the "law of nature" as Andrew M. Hargis here defines it. There has been some misty talk in the books about the law of nature being a sort of common morality; but from Cicero down to Prof. Holland we find that the term, when used correctly, is synonymous with the term "*jus gentium*," and that, apart from affording a sanction to the rules of international law, morality has no place in jurisprudence. In the second place, to the physicist the term "natural law" does not mean something that "regulates forces and processes," but something that is uniformly observed in their operations,—i.e., to him "natural law" connotes method and not government, much less causation. However, "natural law" in Grand Island, Nebraska, may be as original as the law-books that emerge therefrom.

In addition to these interesting features, at the end of the volume the orthoepist rises superior to the legal philosopher and a glossary is appended, teaching us how to understand and to pronounce (incorrectly, wherever it is possible to err) such words as "affidavit," "ambiguous," "ejectment," "judgment," "protest," etc.

Now, there have been a number of excellent law-books written in the United States upon the lines of English models; but they are not the product of the pundit, Andrew M. Hargis, nor were they issued from the press of Grand Island, Nebraska, "America."

NEGLIGENCE OF RAILWAY COMPANIES IN CANADA.

RAILWAY ACT OF 1903.

I. The Operation of Railways.

1. *Their Equipment.*
2. *Speed of Trains.*
3. *Fires from Engines.*
4. *Injury to Persons.*
5. *Injury to Animals.*

II. The Carriage of Goods.

III. The Carriage of Passengers.

In a former article on this subject I dealt with the liability of railway companies under the common law, and tried to show how far, by the decision of our courts, that law still remains in force or is superseded by legislation. As a logical sequel to that article the law embodied in the latest Act of Parliament on the subject, the Railway Act of 1903, will now be considered with a view to pointing out the changes from previous legislation contained therein respecting the negligence of railway companies.

The subject may be divided into three main heads, namely: I. The operation of railways; II. The carriage of goods; and III. The carriage of passengers.

A railway company may be charged with negligence in respect to matters not coming within any of these branches, such as in the construction and maintenance of its road and rolling stock, but these depend merely on the application of the general law to the exercises of powers conferred by the Act and not on the statutory provisions themselves.

I. THE OPERATION OF RAILWAYS.

1. *Equipment.*—By s. 243 of the Railway Act, 1888, every railway company was required to provide and cause to be used on its trains "such known apparatus and arrangements as best afford good and sufficient means of immediate communication between the conductors and engine drivers on such trains while the trains are in motion, and good and sufficient means of applying, by the power of the steam engine or otherwise at the will of the engine

driver or other person appointed to such duty, the brakes to the wheels of the locomotive or tender, or both," and to any car, and of disconnecting the locomotive, tender or cars from each other.

This provision was not in any of the previous Railway Acts, but it was not new law, as the company under the common law was always obliged to furnish the most effective means for stopping a train either to avoid accident or to comply with the requirements of the Act as to stopping at certain places. Thus in 1879 the case of *Brown v. G. W. R. Co.*, 2 App. R. 64, was before the courts, the material question being the liability of the company for failure to comply with the statutory provision for stopping three minutes before crossing another line. The failure to stop was caused by the air-brakes (the best apparatus known) not working and there not being time to use the hand-brakes effectively. The Supreme Court of Canada held (3 S.C.R. 159) that the company was bound to provide for the possible failure of the air-brakes to work properly and was liable to the injury caused by not stopping.

The Railway Act 1903, s. 211, likewise provides that every company shall provide and cause to be used "modern and efficient apparatus, appliances and means" for communication and stopping the train as above, but adds to this that after the 1st January, 1906, the same shall include specified braking apparatus and that trains must also have efficient apparatus for coupling cars automatically.

Why a railway company should be obliged, two years hence, to adopt and use on their trains a specific system for braking is not easy to understand. By that time there must be discovered a much more efficient means for doing that necessary work, but the prescribed apparatus must still be used or the company failing to do so will be liable to the penalty imposed by the said section. It is true that the Act calls for the use of "modern and efficient apparatus," but not the most modern and most efficient, and as the legislation stands the latter may be prohibited. The public were given better protection (and protection to the public is the object of this provision) by the former statute, which required "such known apparatus and arrangements as best afford good and sufficient means" of applying the brakes.

This section also makes a new provision for the security of employees by requiring after January 1, 1906, attachments to be placed on box freight cars and hand grips on ladders to assist persons in

climbing on the roof; and as to these, the Board of Railway Commissioners, established by the Act to take the place of the Railway Committee, is empowered, if at any time there is any other improved side attachment which, in their opinion, is better calculated to promote the safety of the train hands, to require the same to be attached to cars not already fitted with the attachments described. The Act might well have authorized the improvements to be attached to all cars if the legislators were anxious to provide to the fullest possible extent for the safety of the employees. It may be observed that no power is given to the Board to require the adoption of any improved braking system.

By s. 214 a railway company must furnish at the place of crossing, at its junction with other railways and at all stopping places established for the purpose, adequate and suitable accommodation for receiving and loading all traffic offered for carriage for carrying, loading and delivering the same. This is substantially the same as s. 246 of the Act of 1888, which, however, included the carriage of passengers as well as goods.

By s. 213, as in s. 244 of the former Act, every engine must have a bell of at least thirty pounds weight and a steam whistle.

By s. 262, sub-s. 3, of the Act of 1888, "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail." Sub-s. 2 defines "packing," and sub-s. 4 provides for packing between any wing rail and any railway frog, and between the guard rail and the track rail alongside of it. The only change made by the Act of 1903, s. 230, is in substituting four for five inches in the width of the spaces between the rails.

Sub-s. 4 also contained a proviso authorizing the Railway Committee to allow such filling to be left out between the months of December and April, both included, in each year, and in the case of *Washington v. G. T. R. Co.*, 28 S.C.R. 184, the Supreme Court of Canada held that the proviso only applied to the packing provided for in that sub-section and not to that required by sub-s. 3. This was affirmed by the Judicial Committee ([1899] A.C. 275). In the Act of 1903 the proviso is worded so as to empower the Board of Commissioners to leave out any of the required packing between said periods or at such other times as it

sees fit. The *Washington* case will, therefore, not apply to cases arising under the new Act.

In addition to these specific provisions, s. 25 of the Act of 1903 empowers the Board to make orders and regulations, including the following:—(1) With respect to the means of passing from one car to another, inside or overhead, and for the safety of employees while doing so, and for coupling cars. (2) Requiring proper shelter for employees on duty. (3) For use on any engine of nettings, screens, etc., and as to use of any fireguard or works to prevent fires. (4) With respect to the rolling stock, etc., to be used for protection of property, employees and the public.

By s. 40 the Board may make general rules for carrying the Act into effect, and such rules, when published in the *Canada Gazette*, shall be judicially noticed and have effect as if enacted in the Act. Rules made under s. 25 could be published as general rules and have statutory force, and in either case a railway company for refusing to obey them would be subject to the penalty imposed by the Act or the Board. By s. 294 the company or employee in case of disobedience would be liable in damages to any person injured thereby. But see observations on s. 227 post.

2. *Speed of Trains.*—Sec. 223. In passing over any navigable water or canal by means of a draw or swing bridge a train must be brought to a stop before coming on or crossing the bridge, and not proceed until a proper signal has been given. This is an amendment to s. 255 of the Act of 1888, which required the train to stop at least one minute to ascertain if it was passable.

At a bridge where there is an interlocking switch and signal system, or other device which in the opinion of the Board renders it safe to pass without stopping, it may by order permit the same under proper regulations: 55 & 56 Vict. c. 27, s. 7, re-enacted. See *Brown v. G. W. R. Co.*, 3 S.C.R. 159, cited above as to failure to stop owing to non-working of brakes and remarks thereon.

Sec. 225: A crossing where two main lines cross each other at rail level cannot be passed over until the conductor or engineer receives a signal from a competent person in charge that the way is clear. The conductor of an electric street railway company must go forward and see that the track is clear: 56 Vict. c. 27, s. 2, re-enacted in part.

The Act of 1888 required the stopping of one minute.

By s. 226 a train before passing over such crossing must be brought to a full stop except where an interlocking switch and signal system is in use, as to which there is a provision similar to that in sec. 223.

Sec. 227. "No train shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than ten miles an hour, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board. The Board may limit such speed in any case to any rate which it deems expedient."

This provision or the corresponding one in 55 & 56 Vict. c. 27, s. 8, was in question in *McKay v. G. T. R. Co.*, referred to in my former article and since reported 34 S.C.R. 81. By s. 259 of the Act of 1888 the speed was limited to six miles an hour "unless the track is properly fenced." By the amendment in 1892 it was "unless the track is fenced in the manner prescribed by this Act." By the present Act the minimum speed is ten miles an hour, "unless the track is fenced or properly protected" as prescribed.

It is not easy to follow the working of the parliamentary mind in this legislation. The provision was evidently intended to protect the public in crowded districts, and the Act of 1888, in requiring the track to be "properly fenced" meant that it should be fenced so as to accomplish that purpose. But the amendment in 1892 only protected the public by keeping cattle off the track in places where cattle are not likely to be found, and the latest amendment changing the wording to "fenced or properly protected" as prescribed is no amendment at all, since proper protection is not prescribed. It is true that the Act of 1903 re-enacts the provision in the former Act that the Railway Committee (now the Board of Commissioners) may order gates to be erected across highways, or other proper precautions to be taken, but it cannot be said that these are prescribed by the Act. It is also true that under either statute a company or employee who disobeys such order of the Board or Committee is liable in damages to any person injured in consequence of such disobedience: Sec. 259 Act of 1888. Sec. 294 Act of 1903. But in such case it would be a serious question, in view of the Supreme Court decisions, whether the fact that the company had done all that the Act really prescribed would not be a good answer to an action founded

on failure to comply with such order, notwithstanding that the court in McKay's Case held that the Railway Committee was the proper body to see that adequate protection is provided.

The provision in s. 227, that "the Board may limit such speed in any case to any rate which it deems expedient," was not in the former Acts. It can have no effect so long as the prescribed fencing is maintained. By s. 25 the Board may make rules and regulations "limiting the rate of speed at which railway trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages described in any regulation; and if the Board thinks fit the rate of speed within certain described portions of any city, town or village and allowing another rate of speed in other portions thereof." The same provision in the Act of 1888 concluded with "which rate of speed shall not in any case exceed six miles an hour unless the track is properly fenced."

As already pointed out, rules and regulations made under this section have not the effect of statutory enactments, and those made under the authority quoted could not be general rules under s. 40. Moreover, as I have said, what might be ordered by them would not be prescribed by the Act.

By s. 243 "the company may, subject to the provisions and restrictions in this and the special Act contained, make by-laws, rules and regulations respecting: (a) The mode by which, and the speed at which, any rolling stock used on the railway is to be moved."

In *G. T. R. Co. v. McKay*, Sedgewick, J., was of opinion that as the train was travelling at the rate fixed by by-law the jury were not justified in their finding that the speed was excessive.

3. *Fires from Engines*.—Prior to the Act of 1903 there was no direct legislation on the liability of a railway company for injury to property caused by fire from a passing train, but such liability when established by the courts has been based on violation of the common law duty to provide the most efficient means for preventing the escape of sparks from an engine or on some other negligence on the part of the servants of the company. In Quebec the courts have attempted to make a company liable in every such case irrespective of any question of neglect to take proper precautions. Thus in *Roy v. C. P. R. Co.*, Q.R. 9 Q.B. 551, the company was held liable under the provisions of the Civil Code, though no

such negligence was proved, but that judgment was overruled by the Privy Council : [1902] A.C. 220. Now Parliament has apparently made a radical change in the law by enacting in s. 239, sub-s. 2 that : "Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction." The sub-section contains a proviso limiting the amount of damages recoverable if the company has used modern and efficient appliances and has not otherwise been guilty of negligence, and sub-s. 3 gives a company an insurable interest in property along its route.

This legislation has one peculiar feature. Sec. 239 begins as follows : "The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter," and then follows sub-s. 2, quoted above. It might be said that the sub-sections are merely complementary of the opening or main provision and that only fires caused by the presence of combustible matter on the track are contemplated, otherwise there is not the slightest connection between the first and subsequent paragraphs which is opposed to every principle of drafting statutes. On the other hand, a company is made liable for damage by fire "whether guilty of negligence or not." Now, a company is always guilty of negligence if a fire is communicated to adjoining property through the medium of combustible matter on the track : *G. T. R. Co. v. Rainville*, 29 S.C.R. 201 ; so that a fire could never be so caused without negligence.

In addition to this specific section the Board is empowered, by s. 25, to make rules and regulations : "With respect to the use on any engine of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and generally in connection with the railway respecting the construction, use and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along or near the right of way of the railway." This is new, the Railway Committee of the Privy Council not having had such powers. Neglect to comply with such rules or regulations makes

a company or employee liable to damages as well as to a penalty : Sec. 25 (3).

4. *Injury to Persons.*—While the Railway Act contains no direct provisions respecting injury to individuals, there are several sections requiring precautions to be taken for its prevention. Some of these have already been referred to in dealing with other branches of our subject. Thus the provisions relating to equipment, stopping before crossing highways and bridges, the rate of speed through thickly peopled districts and the packing of railway frogs, are all intended for the protection of the public or of railway employees, as are also the rules and regulations which the Board may make under s. 25.

Sec. 224. "When any train is approaching a highway crossing at rail-level (except within the limits of cities or towns where the municipal authorities may pass by-laws prohibiting the same) the engine whistle shall be sounded at least eighty rods before reaching such crossing, and then the bell shall be rung continuously until the engine has crossed such highway ; and the company shall for each neglect to comply with the provisions of this section incur a penalty of eight dollars, and shall also be liable for all damage sustained by any person by reason of such neglect ; and every employee of the company who neglects to comply with this section shall for each offence be subject to a like penalty."

The portion in brackets as to crossings in cities and towns is new, and so is that at the end respecting employees. The Act of 1888, sec. 256, provided that "A moiety of such penalty and damages shall be chargeable to, and collected by the company from, the engineer who has charge of such engine and who neglects to sound the whistle or ring the bell as aforesaid." Now the employee is only liable to a pecuniary penalty.

This warning must be given on approaching a highway during shunting operations : *C. A. R. Co. v. Henderson*, 29 S.C.R. 632 ; but it is not required at a siding or any place other than a highway crossing : *N.B.R. Co. v. Vanwart*, 17 S.C.R. 35.

Secs. 225, 226 and 227 have already been dealt with.

Sec. 228. "Whenever in any city, town or village any train is passing over or along a highway at rail-level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on the then foremost part of the train, or of the tender

if that is in front, a person who shall warn persons standing on, or crossing, or about to cross, the track of such railway," on pain of a penalty. Though worded differently, this is substantially a re-enactment of 55 & 56 Vict. c. 27, s. 9.

Electric street railway cars always run in one direction only on each side of a double track. In *Balfour v. Toronto Ry. Co.*, 32 S.C.R. 239, a car was running in the wrong direction and a person injured recovered damages. The case is not in the Ontario Reports, and in the Supreme Court the law as to the liability of the company was not discussed. The report shews, however, that the jury found as one ground of negligence that the car was on the wrong side, and it would appear that the liability was established independently of any statute indicating that the above section is merely declaratory of the common law.

Sec. 230 provides for packing of frogs.

By s. 235 a company is obliged to notify the Board, immediately on itself receiving notice, of any accident on its railway attended with serious personal injury. Sec. 267 of the Act of 1888 is the same, except that it required notice to be given by the company within forty-eight hours, and by section 268 a commissioner could be appointed by order in council to inquire into the causes of and circumstances connected with any accident or casualty to life or property on any railway. This provision is re-enacted by the Act of 1903 (sec. 236), which also empowers the Board to order an enquiry into all matters likely to cause or prevent accidents.

5. *Injury to Animals*.—Most of the sections heretofore dealt with are intended for the protection of animals as well as of persons. There are, besides, specific provisions in regard to the former.

Sec. 198 provides that "every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes." Sec. 191 of the Act of 1888 was in the same term, but the last Act adds this new provision: "In crossing with live stock the same shall be in charge of some competent person, who shall use all reasonable care and precaution to avoid accidents." This was not in the statute before.

Sec 199. "The company shall erect and maintain upon the railway fences, gates and cattleguards, as follows: "(a) Fences of a minimum height of four feet six inches, on each side of the railway. (b) Swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings, at farm crossings; provided that sliding or hurdle gates, already constructed, may be maintained. (c) Cattleguards, on each side of the highway, at every highway crossing at rail-level by the railway. The railway fences at every such crossing shall be turned into the respective cattleguards on each side of the highway. 2. Such fences, gates and cattleguards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway. 3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, gates and cattleguards unless the Board otherwise orders or directs."

There is little or no difference in substance between this and s. 194 of the Act of 1888. Sub-s. 3 of the latter section, making a company liable for damages caused by want of fences and cattleguards, was repealed by 53 Vict. c. 28 (see s. 237 (4) Act of 1903, post), and s. 196 is not in the present Act. It provided that while the fences and cattleguards are maintained the company should not be liable for such damages unless caused wilfully or negligently. The former Act did not fix the minimum height of fences. The provision in sub-s. (c) is 55 & 56 Vict. c. 27, s. 6, re-enacted.

Sec. 200. "The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed or injured by any train, owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed or injured." Sec. 198 of the Act of 1888 was the same.

Sec. 201. "Every person who wilfully leaves any such gate open without some person being at or near it to prevent animals from passing through it on to the railway, or who takes down any part of a railway fence, or turns any horse, cattle or other animal, upon or within the inclosure of such railway (except for the purpose of, and while, taking the same across the railway in the manner pro-

"4. When any cattle or other animals at large upon a highway or otherwise get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or the custodian of such animal or his agent; but the fact that such animal was not in charge of such competent person or persons shall not for the purposes of this sub-section deprive the owner of his right to recover." Sub. for 53 Vict. c. 28, s. 2. The first paragraph is the same as s. 271 (1) of the Act of 1888, with the addition of the word "competent" before "person" and of the final words "or straying upon the railway." Paragraphs 2 and 3 are identical with s. 271 (2) and (3).

Paragraph 4 is substituted for s. 2 of 53 Vict. c. 28, which made the company liable for damage to any animal in consequence of omission to erect or maintain fences and cattleguards, and repealed and replaced sub-s. 3 of s. 194 of the Act of 1888.

It will probably puzzle our lawyers and judges to reconcile the provisions of paragraphs 3 and 4 of this section 237. Paragraph 3 takes away all right of action from the owner of an animal killed at the point of intersection of two railways if it is at large contrary to the provisions of the section. Paragraph 4 gives a right of action in case of an animal at large getting on the railway at any point and being killed unless it was at large through the negligence or wilful act of the owner. By paragraph 3 the fact that the animal was not in charge of a competent person deprives the owner of his right to recover damages. Under paragraph 4 he is not deprived of his right to recover by want of competent oversight. It does not appear that very great care was taken in the preparation of this section, and especially in drafting paragraph 4, which is substituted for an entirely different provision. It was apparently intended to provide for the case of an animal being killed elsewhere than at the point of intersection of two railways, but unless it can be said that such point of intersection is not the property of the railway company whose train caused the injury it does not express that idea.

24 S.C.R. 611, however, the force of this decision was somewhat weakened by the Court holding that a stipulation limiting the liability to a nominal sum was valid, and since *The Queen v. Grenier*, 30 S.C.R. 42, Vogel's case may be regarded as no longer expressing the law.

Secs. 221 and 222 deal with the carriage of dangerous articles and are the same as ss. 253-4 of the Act of 1888.

Sec. 243. "The company may make by-laws, rules and regulations respecting (b) The hours of the arrival and departure of trains; (c) The loading or unloading of cars and the weights which they are respectively to carry; (d) The receipt and delivery of traffic. These were in the former Act.

Sec. 251 authorizes by-laws respecting tolls for traffic and s. 252 prohibits discrimination amending ss. 223 to 232 inclusive of the Act of 1888.

Sec. 253. "All companies shall according to their respective powers afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock; and no company shall make or give any undue or unreasonable preference or advantage to, or in favor of, any particular person, or company, or any particular description of traffic, in any respect whatsoever,—nor shall any company by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading or delivery of the goods of a similar character in favor of or against any particular person, or company, nor subject any particular person or company, or any particular description of traffic, to any undue, or unreasonable, prejudice or disadvantage, in any respect whatsoever; nor shall any company so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects; and every company which has or works a railway forming part of a continuous line of railway with, or which intersects, any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and for-

ing by its railway, all the traffic arriving by such other way without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as afore- and so that no obstruction is offered to the public desirous of such railways as a continuous line of communication, and so all reasonable accommodation, by means of the railways of several companies, is, at all times, afforded to the public in behalf; and any agreement made between any two or more companies contrary to this section shall be unlawful and null and void. 51 Vict., c. 29, s. 240, am. by 61 Vict., c. 22, s. 1, and 1 Edw. VII., c. 32, am.

2. The Board may determine, as questions of fact, whether or not traffic is or has been carried under substantially similar circumstances and conditions, and whether there has, in any case, been any unjust discrimination, or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this Act, or whether in any case the company has, or has not, complied with the provisions of this and the last preceding section; and may, by regulation, declare what shall constitute substantially similar circumstances and conditions, or unjust or unreasonable preferences, advantages, prejudices, or disadvantages within the meaning of this Act, or what shall constitute compliance or non-compliance with the provisions of this and the last preceding section. (New)."

As to carriage of goods beyond the terminus of the railway by which they are shipped, see *G. T. R. Co. v. McMillan*, 16 S.C.R. 546; *Nor. Pac. R. Co. v. Grant*, 24 S.C.R. 546.

Sec. 254 deals with burden of proof as to discrimination and apportioning rates for land and water carriage amending 61 Vict., c. 22, s. 2.

Sec. 255 gives the Board authority to classify tariffs, s. 226 Act of 1888 amended.

Secs. 256 to 274 inclusive deal further with tariffs, and are all amendments of provisions, except s. 258, which amends s. 229 Act of 1888; s. 271 amending 1 Edw. VII., c. 32, s. 1, and s. 274, sub-s. 4 amending s. 230 Act of 1888.

Sec. 275. "No contract, condition, by-law, regulation, declaration or notice, made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic shall

relieve the company from such liability, except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

"2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited, and may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

This is new and a much more extensive provision than that contained in s. 214, under which Vogel's case was decided, and would seem to render the latter unnecessary, except that it is complete in itself, and cannot be controlled by action of the Board.

Sub-s. 3 of s. 275 authorizes reduced rates being given by the company in special cases and (4) by order of the Board.

Sec. 276. "When the company owns, charters, uses, maintains, or works, or is a party to any arrangement for using, maintaining or working vessels for carrying traffic, by sea or by inland water, between any places or ports in Canada, the provisions of this Act in respect of toll shall, so far as they are applicable, extend to the traffic carried thereby." The former Act did not contain this though some of its provisions were made applicable to carriage by water, s. 223.

Sec. 277. "When any company has power under any special Act to construct, maintain and operate any bridge or tunnel for railway purposes, or for railway and traffic purposes, and to charge tolls for traffic carried over, upon or through such structure by any railway, the provisions of this Act, in respect of tolls, shall, so far as they are applicable, extend to such company and the traffic so carried." (New.)

Sec. 278. "Every company which grants any facilities for the carriage of goods by express to any incorporated express company or person, shall grant equal facilities, on equal terms and conditions, to any other incorporated express company which demands the same": 51 Vict., c. 29, s. 242.

Sec. 279, amending s. 241 of the Act of 1888, provides penalties for fraudulent transactions in respect of the shipping of goods.

Sec. 280, deals with the consequences of non-payment of freight. Secs. 234-237, Act of 1888, inclusive amended.

Sec. 284 authorizes agreement for interchange of traffic between way companies. Sec. 239 Act of 1888 amended.

III. THE CARRIAGE OF PASSENGERS

Some of the sections, already referred to, respecting the equipment and speed of trains, have in view the safety of passengers, as well as the public. There are also a few specific provisions on the subject.

Sec. 216. "Every employee of the company employed in a passenger train, or at a passenger station, shall wear upon his hat or cap a badge, which shall indicate his office, and he shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property": 51 Vict., c. 29, s. 247.

Sec. 217. "Every passenger who refuses to pay his fare may, at the discretion of the conductor of the train, and the train servants of the company, be expelled from and put out of the train, with his baggage, at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force": 51 Vict., c. 29, s. 248.

Sec. 218. "No person injured while on the platform of the car, or on any baggage, or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time": 51 Vict., c. 29, s. 249.

Sec. 219. "No passenger train shall have any freight, merchandise or lumber car in the rear of any passenger car in which any passenger is carried": 51 Vict., c. 29, s. 245 am. The amendment is verbal.

Sec. 22. Every officer or employee of any company who directs or knowingly permits any freight, merchandise or lumber car to be so loaded is guilty of an indictable offence: 51 Vict., c. 29, s. 291,

The word "baggage" before freight in s. 291 is omitted."

Sec. 220. "A check shall be affixed by the company to every parcel of baggage, having a handle, loop or suitable means for attaching a check thereupon, delivered by a passenger to the company for transport, and a duplicate of such check shall be given to

the passenger delivering the same: 51 Vict., c. 29, s. 250, am. in form.

"2. In the case of excessive baggage the company shall be entitled to collect from the passenger, before affixing any such check the toll authorized under this Act. (New.)

"3. If such check is improperly refused on demand, the company shall be liable to such passenger for the sum of eight dollars, which shall be recoverable in a civil action." Sec. 251 of the Act of 1888 also relieved the passenger from payment of fare in such case, and obliged the company to refund it, if paid. This has been omitted.

The conductor of a train is responsible for the maintenance of order and preservation of the peace thereon. If a passenger is assaulted on the train and the conductor, on being informed of it, takes no measures to prevent its repetition, the company is liable to the passenger if assaulted again: *C. P. R. Co. v. Blain*, 34 S.C.R. 74.

In conclusion, it may be remarked that the Railway Act, 1903, repeals all former legislation except s. 2 of 59 Vict., c. 9, which confirms resolutions made under s. 58 Act of 1888 re-enacted by s. 80 Act of 1903.

Ottawa.

C. H. MASTERS.

husband and wife for goods supplied for the use of the household on the order of the wife. The plaintiffs claimed that one or other of the defendants were liable, but did not allege any joint liability. Judgment was signed against the wife under Rule 115 (Ont. Rule 603) and the defendant proceeded with the action against the husband under Rule 119 (Ont. Rule 605) who proved that he had after July, 1899, given his wife an allowance for providing for the household expenses. Part of the plaintiff's claim was for goods supplied before and part after July, 1899. The Court of Appeal dismissed the action against the husband as to the goods supplied before July, 1899, on the ground that there was no evidence of any joint liability, and as to the goods supplied after July, 1899, because the presumption of the wife's agency was rebutted by proof of the allowance. The House of Lords affirmed the judgment on the ground that the plaintiff having taken judgment against the agent could not thereafter recover for the same debt against the principal. Rule 119 (Ont. Rule 605) being held not to apply to the case of a claim of alternative liability; in such a case the doctrine of election established by *Scarf v. Jardine*, 7 App. Cas. 345, applies, and the plaintiff taking judgment against one of the parties alleged to be alternatively liable is deemed to have elected to take his remedy against that one, and cannot afterwards sue the other.

COPYRIGHT—ARTICLE IN ENCYCLOPÆDIA—AUTHOR AND PUBLISHER—COPYRIGHT IN CONTRIBUTIONS—COPYRIGHT ACT, 1842 (5 & 6 VICT., c. 45) ss. 2, 3, 18.

Laurence v. Aflalo (1904) A.C. 17, is the case known as *Aflalo v. Laurence* (1903) 1 Ch. 318 (noted ante vol. 39, p. 354). The plaintiffs, in pursuance of a contract with the defendants, were the writers of certain articles in an encyclopædia of sport published by the defendants. After the publication of the encyclopædia the defendants published another work in which they included the articles written by the plaintiffs for the encyclopædia, this the plaintiffs claimed was an infringement of their copyright in such articles and the Court of Appeal so held. The House of Lords (Lord Halsbury, L.C., and Lords Shand, Davey and Robertson) have unanimously reversed that decision, holding on the evidence that under the contract between the plaintiffs and the defendants, the defendants became the absolute owners of the articles, and that

English Cases.

and not the plaintiffs were entitled to
Lordships adopt the view expressed in
159, that it may be inferred from the
right was intended to belong to the
express contract on the point.

TENANT AND LESSEE—RENEWAL LEASE—"AT THE
COSTS OF REFERENCE AND AWARD AS TO AMOUNT

Fitzsimmons v. Mostyn (1904) A.C. 411
Halsbury, LC., and Lords Shand, 1
they) have affirmed the decision of the (C
349, holding that where by the terms
entitled to a renewal of the lease "at the
costs of the reference and award to fix
the costs for the renewal are part of the costs

**DOMINION LANDS ACT—(R.S.O. c. 54) s. 47—MINING
s. 17—RIGHTS OF PLACER MINER AS TO RE
ROYALTY—TAX.**

Chappelle v. the King (1904) A.C. 127, was
appeals from the Supreme Court of Canada
between placer miners under the Dominion Lands Act
and the Mining Regulations of 1889, s. 17, who
had appealed to the Judicial Committee of the Privy Council
by, Robertson and Lindley, and Sir
the appeal and cross appeals, holding
that the Mining Regulations does not extend to the
placer mining the same privileges as to the
holder of a quartz mining grant
placer miner's right to a renewal is not
preferential, and he holds under an annual
grant but not in continuation of his original
grant is subject to all such regulations
from the date when it comes into operation, whether
during the currency of an existing
grant the committee holds therefore that the Government
has power to make regulations requiring the
percentage of the proceeds realized from
the grant an imposition called a royalty is not a
charge on an owner in fee is entitled to make out

 REPORTS AND NOTES OF CASES.

Dominion of Canada.

 SUPREME COURT.

B.C.]

DOBERER v. MEGAW.

[Nov. 10, 1903.]

Arbitration—Setting aside award—Misconduct of arbitrator—Partiality—Evidence—Jurisdiction of majority—Decision in absence of third arbitrator—Judicial discretion.

A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting the third arbitrator failed to attend on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present.

Held, reversing the judgment appealed from, that under the circumstances, there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award without reference to the absent arbitrator.

Held, also, that although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary.

Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute such as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award. Appeal allowed with costs.

Sir C. H. Tupper, K.C., for appellant. *Davis*, K.C., for respondent.

B.C.]

NORTH VANCOUVER v. TRACY.

[Nov. 10, 1903.]

Contract—Resolution by municipal corporation—Acceptance of offer to purchase—Evidence—Statute of frauds—Writing—Estoppel.

T. offered to purchase lands which the municipality had bid in at a tax sale and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs and interest" against the lands and authorized the reeve and clerk to issue a deed at that price.

reversing the judgment appealed from, that even if communicated as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest. The instrument, which was never delivered to T., was executed by the clerk of the municipality in the statutory form of conveyance for taxes, reciting the above resolution but without a reference to a contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lot, the council resolved to intimate to the person making the second offer that the lot had been sold to T."

It was held, that these circumstances could not be relied upon as an admission of a prior contract of sale.

It was also held, that, even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communications in respect thereto made by the municipality and consequently the alleged admissions of a contract did not satisfy the Statute of frauds and could have no effect. Costs allowed with costs.

Wells, K.C., and *Rose*, for appellant. *Davis*, K.C., for respondent.

VEILLEUX v. ORDWAY.

[Nov. 30, 1903.

—Deceit and fraud—Rescission—Evidence—Concurrent findings of lower courts—Duty of second court to appeal.

The sale of timber limits to the plaintiff was effected through a broker who stated in the deed to be \$112,500, but the vendor signed an acknowledgment that the true price, as far as he was concerned, was \$75,000. At the time of the execution of the deed a statement was made shewing that the purchase money was to be paid and the vendor signed an agreement that out of the balance of the \$112,500, viz., \$46,502.02, the plaintiff was to receive \$37,500, i.e., the amount of the difference between the true price and the price mentioned in the deed. The vendor refused to pay over this sum on the ground that the plaintiff and the broker had conspired to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for \$75,000 but to the plaintiff's assigns, the grantees in the deed, for the full consideration of \$112,500. It was held, that the plaintiff and the broker were acting fraudulently and seeking to employ artifice to deprive him of the full price at which the sale had been effected. In an action to recover the \$37,500 from the vendor,

the court affirmed the judgments appealed from, that the acknowledgments signed by the vendor settled the rights of the parties unless there was very strong evidence to the contrary and, as there was no such evidence and as the facts and circumstances as found by the courts below, tended to shew that

plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second court of appeal would not be justified in disturbing the concurrent findings at the trial and of the court appealed from. Appeal dismissed with costs.

Stuart, K.C., and Pelletier, K.C., for appellant. Bedard, K.C., and Taschereau, K.C., for respondent.

Que.] COGHLIN v. JOLIETTE. [Nov. 30, 1903.

Breach of contract—Damages—Evidence—Discretionary order by judge at trial—Interference by Court of Appeal.

The trial court condemned the defendant to pay \$122.50 damages for breach of contract for the sale of goods, but in view of unnecessary expenditures caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant the Court of King's Bench varied the trial court judgment by adding \$100 exemplary damages to the condemnation and giving full costs against the defendants.

Held, reversing the judgment appealed from, that in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial court. Appeal allowed with costs.

Beique, K.C., and Lafleur, K.C., for appellant. Renaud, K.C., for respondent.

B.C.] TURNER v. COWAN. [Nov. 30, 1903.

Company law—Payment for shares—Transfer of business assets—Debt due partnership—Set-off—Counterclaim—Accord and satisfaction—Liability on subscription for shares.

On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid-up shares at their par value in satisfaction of his interest in the partnership assets.

Held, reversing the judgment appealed from (9 B.C.R. 301.) DAVIES, J., dubitante, that the transaction did not amount to payment in cash for shares subscribed by the partners within the meaning of ss. 50, 51 of the Companies Act, R.S.B.C., c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares. *Fotherill's Case*, 8 Ch. App. 27, followed. Appeal allowed with costs.

Riddell, K.C., for appellant. Davis, K.C., for respondent.

Reports and Notes of Cases.

[C.] O'BRIEN v. MACKINTOSH. [N

*Contract—Agreement in writing—Construction—Sale of timber
payment.*

The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment being that, as soon as the Crown grant issued, the respondent was to pay judgment against the appellant which they both understood was to be purchased for \$500. On the issue of the grant, about a month afterwards, the judgment creditor refused to accept \$500 as full payment of the latter date and he took proceedings to enforce execution of the judgment. The execution was opposed on behalf of the appellant, respondent becoming surety for the costs and being also made party to the proceedings.

Held, affirming the judgment appealed from (10 B.C.R. 100). Payment to settle the outstanding judgment was not made under the terms of the respondent, but was limited to settling it for \$500, after the issue of the Crown grant for the land.

Held, also, DAVIES, J., dissenting, that the costs incurred by the respondent in opposing the execution of the judgment, upon being ordered to pay the same, were properly chargeable against the appellant.

Costs awarded with costs. *Shepley*, K.C., for appellants. *Davidson*, K.C., for respondent.

[C.] HASTINGS v. LE ROI, No. 2. [N

*Negligence—Mining operations—Contract for special works—
by contractor—Control and direction of mine owner
machinery—Notice—Failure to remedy defect—Injury to*

The sinking of a winze in a mine belonging to the defendant, was caused by the negligence of the contractors who used the hoisting apparatus which the defendant owned, maintained, and operated by their servants, in the excavation, and the dumping of materials, in working the mine under the direction of the defendant's manager. The winze was to be sunk according to directions of the defendant's engineer, and the contractors' employees were subject to the control and direction of the defendant's superintendent, who also fixed their wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions and was injured by the fall of a hoisting bucket which happened in connection with the hoisting gear, which had been reported to the defendant's mechanic and had not been remedied.

Held, affirming the judgment appealed from (10 B.C.R. 500). *Davies*, J., dissenting, that the plaintiff was in common employment with the defendant.

defendants' servants engaged in the operation of the mine and that even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment. Appeal dismissed with costs.

Shepley, K.C., for appellant. Davis, K.C., for respondent.

Man.] WHITLA v. MANITOBA ASSURANCE CO. [Nov. 30, 1903.
WHITLA v. ROYAL INSURANCE CO.

Fire insurance—Condition of policy—Double insurance—Application—Representation—Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.

B., desiring to abandon his insurance against fire with the Manitoba Assurance Co. and in lieu thereof to effect insurance on the same property with the Royal Insurance Co., wrote the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy and forwarded the application and the premium with his report to the company's head office in Montreal where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the Royal, and while the interim receipt was still in force the property insured was destroyed by fire and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies which were resisted and he subsequently assigned his rights to the plaintiffs by whom actions were taken against both companies.

Held, reversing both judgments appealed from (14 Man.L.R. 90), that as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk notwithstanding that such prior insurance had not been formally abandoned and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent.

Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

The Chief Justice dissented from the opinion of the majority of the

which held the Royal Insurance Company liable and considered that the circumstances B. could not recover against either company.

Appeal allowed with costs.

S. Tupper, K.C., Haggart, K.C., Munson, K.C., Lewis and
for various parties.

EXCHEQUER COURT OF CANADA.

Ge, J.] GORHAM MANUFACTURING CO. v. ELLIS & CO. [Mar. 7.

*mark—Infringement—Sterling silver “hall mark”—Right to
register goods bearing mark on Canadian market.*

by the laws of any country the makers of certain goods are required
thereon certain prescribed marks to denote the standard or character
a goods, and goods bearing the prescribed marks are exported to
and put upon the market here, it is not possible thereafter, and
such goods are to be found in the Canadian market, for any one to
in Canada a right to the exclusive use of such prescribed marks to
be applied to the same class of goods, or to the exclusive use of any mark
resembling the prescribed marks as to be calculated to deceive
lead the public.

Issue: Whether any one would, in such a case, be precluded from
having a right in Canada to the exclusive use of such a trade mark where
there was no importation into Canada of goods bearing the prescribed
marks.

The plaintiffs brought an action for the infringement of their registered
trade mark to be applied to goods manufactured by them from
sterling silver which it was thought so resembled the Birmingham Hall-
mark as to be calculated to deceive or mislead the public,
and appeared that during the time that the plaintiff's goods, bearing such
marks, were upon the Canadian market, goods bearing the Birmingham
mark, were also upon the market here.

Held, that the plaintiff could not, under the circumstances, acquire the
exclusive right to the use as a trade mark of the mark that he had been so

W. L. Blackstock, K.C., for plaintiffs. Blackstock, K.C., for defendants.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Maclellan, Garrow, J.J.A.]

[Nov. 16, 1903.]

CENTAUR CYCLE CO. v. HILL.

Sale of goods—Action for contract price—Defence and set off—Substitution of castings for forgings in manufacture—Condition precedent—Warranty—Resale with similar warranty—Right of vendee complete without resale—Measure of damage—Delay.

In an action for the contract price for goods sold and delivered in which it was shewn that the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings.

Held, 1. The defendants were entitled to have their damages applied in reduction of the plaintiff's claim.

2. As soon as the vendee discovers the defect he may bring an action on the warranty and recover the value of the article he should have received, and that the right of action is complete without a resale and that the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them.

3. Where credit is given or where the goods have been paid for, the vendee may sue at once, or in the case of credit, if vendee so elects, he may await an action for the price and set off or counterclaim for his damages by reason of the defective material or other breach of warranty.

4. Where there had been delay in the delivery of the samples as well as the bulk of the goods ordered for a particular season which arrived late for the season, and, in consequence, were sold at a loss, the measure of the damages is the difference between the value of the goods at the time at which they were to have been delivered according to the contract and their value for the purpose of resale, as the plaintiffs well knew, at the time when they were actually delivered. *Wilson v. Lancashire and Yorkshire R. W. Co.* (1861) 9 C.B.N.S. 632, and *Schulze v. Great Eastern R. W. Co.* (1887) 19 Q.B.D. 30, followed.

Ryckman and C. W. Kerr, for the defendants E. C. Hill and E. C. Hill & Co., on appeal and cross-appeal. *Rowell, K.C.*, and *Casey Wood*, for the plaintiffs' contra and on cross appeal.

Police Magistrate, Hamilton.]

[Jan. 5.]

REX v. WALSH.

Criminal law—Summary trial—Police Magistrate—Neglect to inform prisoner of next Court for jury trial—Election—Adding to indictment.

The prisoner was charged with an offence which was not triable summarily by the Police Magistrate, except upon consent. The Magi-

the prisoner as to whether he elected to be tried by him or but did not state at what Court his case would be tried. was represented by counsel.

claren, J. A., dissenting, that, Police Magistrate had no jurisdiction to try the case, as he had Court at which the prisoner would be soonest tried.

Magistrate having entered upon the trial he had no power to dictment by making a further charge, unless the prisoner n put to his election and consent to such trial.

n quashed and new trial ordered.

and *E. N. Armour*, for prisoner. *Cartwright*, K.C., for the

KEENAN v. OSBORNE.

[Jan. 29.

Mortgage to execution creditor—Assignment of, before seizure—Attack by action.

of a sheriff to an interpleader order depends upon either subject matter of the interpleader in his possession, or having er an execution accompanied with an intention to take

an execution debtor, who was a mortgagee of lands, had mortgage even although the assignment was not registered : the mortgage could not be seized under the provisions of Act, R.S.O. 1897, c. 77, s. 23 et seq, and that the sheriff eed until the execution creditors had in an action obtained f the Court that the assignment was void and that he could

for claimant. *F. A. Anglin*, K.C., and *Raney*, for the cution creditors.

REX v. SHAND.

[Feb. 2.

—Obstructing officer—Seizure of chattel—Sale of goods—Conditional sale.

ing of possession of a chattel by the vendors thereof under of a conditional sale agreement, is not a seizure within the Criminal Code, s. 144, sub-s. 2 (b), so as to subject the e chattel, who in good faith disputes the right to retake it, rescribed in that sub-section. Conviction quashed.

ight, for prisoner. *Cartwright*, K.C., for Crown.

HIGH COURT OF JUSTICE.

Britton, J.]

POPE v. PRATE.

[Feb. 18.]

Injunction—Teaching music—Noise—Nuisance.

Defendant hired rooms in a business part of a city for the purpose of giving music lessons, put up his sign and gave lessons on the mandolin to over 200 pupils between the hours of 9 a.m. and 10 p.m. On a motion for an injunction by an occupier of rooms on the opposite side of the hall in the same building, who had taken his rooms subsequently, to restrain the defendant from giving lessons on the ground that the noise was a nuisance. It was

Held, on the evidence that the noise to which objection was taken was reasonably connected with and incidental to the teaching, that the defendant's use of the premises was not an unreasonable use; and that to offend against the law the teaching of music lessons in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; that an injunction would break up his business and it would be better that the plaintiff should be compensated in damages if he was entitled to recover and the injunction was refused.

N. G. Guthrie, for plaintiff. *A. E. Fripp*, for defendant.

Cartwright—Master.]

[Feb. 24.]

AMERICAN ARISTOTYPE CO. v. EAKINS.

Security for costs—Money paid into court for—Tender by defendant before action and money paid into court in satisfaction of plaintiff's claim—Application for payment out in the alternative.

The plaintiffs, resident in the States, in compliance with an order for security for costs paid \$200 into court. The defendants in their defence set up tender, before action and paid into court \$189.52 in full of plaintiffs' claim of \$353.89 and costs. On an application by the plaintiffs for an order either for payment out of the money paid in by the defendants or for an order rescinding the order for security for costs and repayment of the \$200 paid in by the plaintiffs. It was

Held, following *Griffiths v. School Board of Ystradysfodwg* (1890) 24 Q.B.D. 307, that if the plaintiffs elect to take out the money paid in with the plea of tender, they must take it out in full of their claim and the defendants would be entitled to their costs.

Held, also, that the order for security for costs having been regularly issued and acted on, it was too late to set it aside and the motion was dismissed.

W. R. Smyth, for the motion. *W. J. O'Neil*, contra.

Reports on

Wright—Master.] ANDRE

Parties—Joinder of a

In considering the propriety of the action and of the relief a equitable nature, all parties necessary to give the plaintiff, assuming that the action is n plaintiff cannot join two independent to the same subject-matter the parties.

In an action claiming as against the other defendants a deed from a third person as the plaintiff alleged, should rectification was sought, *v. Grand Trunk R. W.* to elect as against which *A. Moss*, for defendant *W. M. Douglas*, K.C., for

Wright—Master.]

HOCKLEY v. G

proceedings—Postponing

Motion by the defendants appeal by them to the Superior Court and by the Court as refused, the plaintiff in ed, being a young widow of herself and her infant child the jury without an assessment, for defendants. *McCu*

onal Court.]

IN RE MCKAIN AND CANA

Company—Share—Transf

A provision in a certificate of company incorporated by special part and parcel of this contract purchaser in good faith of the share to the company a lien on any and all amounts that may be

to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee. Judgment of FERGUSON, J., affirmed.

W. H. Blake, K.C., for company. *C. A. Moss*, for applicant.

Divisional Court.]

[March 14.

ONTARIO POWER COMPANY v. WHATTIER.

Partition—Sale—Special value—Con. Rules, form No. 158.

The form of judgment for partition or sale (Con. Rules, No. 158) must be read in the light of the legislation by which the court has been given the right to order a partition instead of a sale, and its meaning is that a partition is to be made unless it is shewn by those who ask for a sale that a partition cannot be made without prejudice to the interests of the owners of the estate as a whole.

A report directing partition was therefore upheld where there was no physical difficulty in dividing the land and the plaintiffs had been allotted that portion of it adjoining other lands owned by them, the argument in favour of a sale being that the portion allotted to the plaintiffs was of special value to them, so that in the event of a sale it would have been necessary for them to purchase the whole of the land at whatever price it might have been bid up to, and thus have benefited the co-owners. Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Masten, for appellants. *Cassels*, K.C., and *F. W. Hill*, for respondents.

ELECTION CASES.

Moss, C.J.O.] IN RE NORTH RENFREW (PROVINCIAL). [March 7.

Petition—Qualification of petitioner—"Reside"—Ontario Controverted Elections Act.

The word "reside" in s. 3 of the Ontario Controverted Elections Act, R.S.O. 1897, c. 11, as amended by 62 Vict. (2) c. 6, s. 1, is intended to denote the place where the petitioner "eats, drinks and sleeps." And therefore, a petitioner who owned a farm assessed in all for more than one thousand dollars, and all in one electoral district, but the house and part of the land, assessed for less than that sum, being in one township, and the main part of the land in another township, was held to be unqualified, the assessment of the part with the house being alone regarded.

Hellmuth, K.C., for respondent. *R. A. Grant*, for petitioners.

Province o

KING'S

Court.] **CENTRE STAR v. ROSE**
—Substituted service—Extra
ing to order—New material on a
discretion.

Appeal from an order of IRVING
ed service.

Held, that an affidavit leading
fictional affidavit.

An affidavit leading to an order
Companies Act on an extra-provi
British Columbia should shew c
cial one licensed to do business
an application to set aside
tional with the judge to allow
g out facts omitted in the affida
in the exercise of his discretio
ot interfere.

ndgment of IRVING, J., affirmed
C. Galt, for appellant. *Dev*

Courts an

Frances Alexander Anglin, K.C.
gton, K.C., of the City of Stra
rt of Judicature for Ontario, i
ario, and members of the Excheq
etted March 19.)

John Joseph O'Meara, of Pemb
nty Court of Carlton, in the roo
ased. (Gazetted March 12.)

Dennis Joseph Donahue, K.C.,
e of the County Court of the Co
our John Deacon, retired.

His Honour Albert Constantines
of Prescott and Russell, to be
our Peter O'Brian, retired.

Talbot Macbeth, K.C., of the City of London, to be Judge of the County of Middlesex, in the room of His Honour William Elliott, retired.

John Lawrence Dowlin, of the City of Ottawa, Barrister-at-Law, to be Junior Judge of the County of Kent, in the room of His Honour Robert Stewart Woods, retired. (Gazetted March 29.)

Flotsam and Jetsam.

How the United States worked the Alaskan award.—There was published yesterday the full text of the letters that have passed between Great Britain, Canada and the United States, on the subject of the Alaskan dispute and the notorious award of the arbitrators. Full of significant facts that have not yet been made public, it reveals the extraordinary facility with which the United States succeeded in bluffing Great Britain into accepting the appeal to arbitration under their own conditions. After three years of unsatisfactory official correspondence, Mr. Hay, on October 17, 1902, on behalf of the United States, suggested that a tribunal of jurists should be appointed whose members should give a reasoned, but not a final opinion on the questions at issue. Having secured British and Canadian approval of this modest proposal, Mr. Hay then drew the bow wildly, and asked that the decision of a majority of this tribunal of jurists should be considered final. Great Britain fell an easy prey, and replied with a ready affirmative, suggesting faintly, however, that all American members of the tribunal in this case should be judges of the Supreme Court. Mr. Hay agreed with the excellence of this as a theory, but apologised for refusing to put it into practice. Matters were rushed forward and when the crucial time came Mr. Hay quietly nominated Mr. Root, U.S. Secretary for war, and two senators as the American members of the Commission. Canada angrily protested, and asked where the impartial jurists of repute were. Great Britain expressed mild surprise at their absence, but at once capitulated, saying that it was no use asking the United States to withdraw the names put forward. The end of this was the notorious award, which became inevitable after such a selection, and which surrendered the whole matter in dispute to the United States.—*London Daily Express, Feb. 3.*

A Worcester paper has unearthed a funny petition. In the reprint from the *Times* of August 26, 1803, a petition to Parliament is quoted, shewing that the number of attorneys had increased in two counties from eight to twenty-four, whereby the peace of those counties had been greatly interrupted by suits. The petitioners therefore prayed that the number be reduced, so that there should be no more than six each in Norfolk and Suffolk, and two for the city of Norwich. The petition was granted provided the judge thought it reasonable.—*Ex.*

Canada L

VOL. XL.

APR

We publish in another contributor, discussing the relation well there should be no maxim, with which he concludes, however, to rely upon newspaper and we should be more inclined correct than that the learned Kennedy case at Brantford, in his charge to the jury, and it, usual and proper for the jury to follow the evidence as it appears, but this is not generally an intelligent summary of the evidence usually concludes with the duty of the jury to see that the evidence is not influenced by his trial; to be influenced in coming to a verdict on the evidence of the witnesses in their own room. It would be a mistake to rely on the preliminary evidence as to it. Any language, or any suggestion, to it should always be carefully watched, lest it might easily receive an undue impression, or an unintentional impression, occupying the position of a juror, and not properly derivable from the evidence referred to.

In the *Confederation Life* insurance case made by both the learned judges, and the learned counsel, to harmonize the applicable principles affecting a point of practice.

it appears to us, with out much success. The defendant had, within the time allowed for appearance, filed his appearance and also his defence in which he stated that he did not require any statement of claim as he was entitled to do under Rules 171 and 247. He took out the usual order to produce documents, with which the plaintiffs complied, and thereafter the plaintiffs delivered a statement of claim which the defendant moved to set aside for irregularity (1) on the ground that the plaintiffs had no right to deliver a statement of claim after a defence had been filed, and (2) because, as was alleged, the statement of claim went beyond the claim made in the indorsement on the writ. The Master dismissed the motion, holding that notwithstanding the defendant had dispensed with a statement of claim, the plaintiffs were nevertheless entitled to deliver one within the ordinary time after appearance under Rule 243 (b). Mr. Justice Meredith came to the conclusion that when the defendant dispenses with a statement of claim, the indorsement on the writ becomes the statement of claim, and is amendable, as of course, like an ordinary statement of claim under Rule 300. So far so good, and with that conclusion we have no fault to find. Where we venture to think the learned Judge erred was in not following out his own reasoning to its legitimate conclusion, having regard to the provisions of Rule 309, "a proceeding shall not be defeated by any formal objection." Granted that the indorsement was the statement of claim, granted that it might be amended under Rule 300, does it not follow that the statement of claim sought to be set aside, ought to have been treated, as what in substance it actually was, viz.: an amended statement of claim. Surely it is going back to the days of technical objections to set aside a pleading merely because it omits to state on its face that it is an amended pleading when that fact is visible in every line of its contents. If this document had been indorsed "amended statement of claim" it would, according to Mr. Justice Meredith's reasoning have been all right and unassailable, but because it happened to omit the word "amended" it was set aside. This seems like a step in a retrograde direction and not like the forward view generally characteristic of that excellent Judge.

PROPERTY IN DOGS.

Though at first sight but a matter of small importance, the status of the dog has been the subject of much litigation, the object of much controversy, and of many judicial opinions. That there should be any doubt upon the matter seems surprising when we consider how important a part the dog has played at all times in human affairs. There is no part of the world, and no condition of society, in which men, whether savage or civilized, have not made use of him. In the Arctic Regions he serves as a substitute for the reindeer, and as a means of transport where no other can be used. He promotes the progress of science by enabling the searcher for the North Pole to execute his adventurous quest. He is the mail-carrier for the Hudson's Bay Company, and is in the daily employ of the Eskimo and the Indian in their hunting expeditions, or winter journeys of any kind. In the Torrid Zone he is less useful, but there he does good work as a scavenger.

In temperate climates the dog fulfills a great number of useful functions. He is the friend and pet of man, whether rich or poor, the lap-dog of the lady of fashion, more tenderly cared for than many of the human race, to the half-starved mongrel who gnaws the crust of the beggar. What would society be without sports, and how could the sports be carried on without the dog? But he has an actual money value as well. He is the watch-dog and policeman of every family, and protects their lives and property. To the farmer he saves a man's wages in helping him to manage his cattle and his sheep, and in many other ways the dog is an animal for use as well as amusement.

Why then, with all these qualities and qualifications, is the dog regarded in the eye of the law as differing from, and altogether on a lower scale than the horse, the mule or the ass? Why for instance cannot a suit be maintained against a railway company for the negligent killing of a dog? Such nevertheless was the recent judgment on appeal to the Supreme Court of Georgia in a case reported in 37 Central Law Journal, p. 389. Following the accepted law on the subject Cobb, J., with much regret gave judgment as above stated, at the same time saying that for himself he saw no good reason why the dog should not have the same status before the law as any other domestic animal.

By the common law of England it would appear that the legal status of the dog rests entirely with himself. He is mercifully

assumed to belong to the class *mansuetæ naturæ*, and is therefore ranked with other domestic animals. But if he allows his angry passions to rise, and wantonly does mischief to either man or beast, he falls into the ranks of animals *feræ naturæ*, and is treated accordingly. But not only is he liable in his proper person to various pains and penalties, but he involves his owner also in serious liabilities for the consequences of his misconduct. Consistently, however, with the assumption above stated the owner must be shewn to have become acquainted with the change of character from that of a domestic animal to that of a wild beast, and that knowledge must be pleaded in any proceedings taken.

By the old law there could not be larceny of a dog. The theft of a dog might be the subject of a civil action, but not of a criminal prosecution. Now, under the Larceny Act of 1861, special provision is made for the punishment of dog-stealing, or the receiving of stolen dogs. A dog is now also held to be *goods*, and his delivery may be ordered if unlawfully detained. And although a railway company cannot be held liable for running over a dog, the company must carry them as it would their passengers, subject to certain specified conditions. See post p. .

The humane spirit of modern legislation has been extended to the dog as well as to his master, and cruelty to dogs is punishable by law.

The special liking which the dog has for mutton, whether in the shape of the roast leg which he snatches from the oven, or in the hunting and killing of the sheep when at large, has involved him in very serious trouble. Punishment for the more venial offence rests with the cook or the housekeeper, but the more serious one is severely dealt with. Sheep worrying, both in England and this country, has been legislated against by various enactments, both parliamentary and municipal. It is the one offence which is unpardonable, and the death penalty is inflicted often upon mere suspicion of the crime. Nothing is more harrowing to the feelings of the owner of some pet animal, in all other respects entitled to the warmest affection, than to have the faithful friend and companion charged with having committed, or being suspected of having committed, an assault upon such a helpless victim as a poor sheep, even where its life was not taken. Once begun, the habit is incurable and no mercy can be shewn.

cases bearing upon dog law are numerous, from the days of the earliest records of our courts down to the present time, and as Chief Justices Hale and Holt can be quoted as authorities on the subject which we have only had space to mention in the most general terms.

LIABILITY OF MUNICIPALITY FOR FAILURE OF ITS OFFICERS TO ENFORCE ORDINANCES.

Referring to the article from the *Central Law Journal* which appeared in this journal, ante p. 183, there is an interesting phase of the case which counsel unsuccessfully urged on behalf of the defendant in the case of *Brown v. City of Hamilton*, 4 O.L.R. 249, which it seems to the writer, has not generally received the attention it deserves. We refer to nuisances on the streets which are prohibited by ordinance or by-law, but permitted by the law to continue, considered from a *nuisance* standpoint.

The soil of the road or street is vested in the municipality under the Municipal Act R.S.O. (1897), c. 223, ss. 601. See also *Ricketts v. Markdale*, 31 O.R. 610; *Deane v. City of Montreal*, 12 A.C. 149 (1886), per Lord Macmillan at p. 159; *Town of Sarnia v. G.W. Ry. Co.*, 21 U.C.Q.B. 1, per McLean, J., at p. 62.

In the United States the condition of the highway much more often obtains in Ontario. The American authorities therefore have weight here.

Things "which arise from the unreasonable, unwarrantable and unnecessary use by a person of his own property, real or personal, which causes obstruction of or injury to a right of another, or of the production of such material annoyance, inconvenience, or hurt that the law will presume consequent damage" are nuisances at common law: Wood on Nuisances, s. 1. And the law is "a system of elementary principles and of general maxims which are continually expanding with the progress of civilization and adapting themselves to the gradual changes of trade and mechanical arts and the exigencies and usages of the time": *Pierce v. Swan Point Cemetery*, 10 R.I. 227, 14 Am. Dec. 100; *Jacob v. State*, 3 Humph. 495; *Hightower v. Fitzpatrick*, 100 N.Y. 100.

A municipality is liable just as an individual would be for creating a nuisance on his property: per Mason, J., in *Baltimore v. City of Baltimore*, 9 Md. 160; *Cochrane v. Frostburg*, 27 L.R.A. 728.

It has been held that where a corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it: *Wood on Nuisances*, 2nd ed., s. 749; *Baltimore v. Marriott*, 9 Md. 160; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312, 17 Am. Rep. 603; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759.

Hagerstown v. Klotz, 54 L.R.A. 940, goes perhaps farther than any other case in asserting the doctrine that a by-law prohibiting nuisances on public streets must not be allowed to become a dead letter but must be vigorously enforced, and that municipal corporations must take ordinary care and diligence to protect the public and prevent nuisances dangerous to the public has also the support of *Cochrane v. Frostburg*, 27 L.R.A. 728; *Spier v. Brooklyn*, 21 L.R.A. 641, and *Forget v. City of Montreal*, Mont. L.R. 4 Sup. Ct. 77. And an unlawful use of a street subjects the corporation to an action for damages: *Porterfield v. Bond*, 38 Fed. R. 391; *Elliott on Roads and Streets*, 267 and 677 and cases there cited; *Wood on Nuisances*, p. 749.

According to this theory we might go a step farther and contend that the existence of a prohibitory ordinance is not a condition precedent to a right of action wherein it would seem to differ from the principles necessarily applicable to non-enforcement cases not considered from a nuisance point of view.

The gist of the action is the permitting of the nuisance, not the failure to enforce the ordinance or by-law; but the municipality must do some corporate act to abate the nuisance, and the passing of the ordinance is the first corporate step in the means. It could hardly be contended that an isolated infraction of the ordinance would constitute a nuisance, but the act complained of to constitute such must be continuous or frequent, openly committed and allowed to continue without any effort on the part of the municipality to abate it.

These are merely some detached ideas which may be useful as furnishing food for thought even if too advanced or visionary to be safely followed in view of the great weight of authority to the contrary.

Hamilton.

JOHN G. FARMER.

RELATION OF JUDGES TO GRAND JURIES.

stitution of the grand jury is acknowledged to be of origin, and constitutes for the subject a valuable heritage. Necessity for a presentment by them against a person exists the barrier which the law's foresight places between the final umpire as to guilt and innocence, technically "the country". Approved as they find it by the test of time, it behooves possessors of the boon to show fitting regard for its worth.

Discussion of this topic is opportune at this juncture in view of Justice Street's charge to the grand inquest on the Kennedy case at Brantford; its nature making it pertinent to enquire whether a judge in directing the body may discuss matters which he undertake at best more than the duty of enlightening the jury as to how these may bear upon the law?

English text book clearly defines the judge's province with the instructions vouchsafed to a grand jury. Chitty's Criminal Law puts it in this way, "When they (the grand jury) are charged by the judge gives them such a charge as he thinks the cases before them will most particularly require." Mr. Chitty's book on criminal law speaks as follows:—"The object of the charge is to assist the grand jury in coming to a right conclusion by directing their attention to points in the various cases which are considered by them which require special attention." In his observation, it will be noted, gives the line of demar-

Justice affords the estimate of Mr. Sergeant Talfourd in

"That charge, for the most part, consists of remarks which explain and elucidate any cases which the calendar may present and requiring more than ordinary attention, either from the complicated nature of the facts, or from the law applicable to them happening to be of recent enactment, or of infrequent occurrence."

When parties have been committed, or held to bail on condition of appearing upon any recent Act of Parliament, it becomes necessary that the statute should be stated and explained.

Thompson and Merriam on Juries contains, also, a number of two of importance, to one of which subsequent reference will be made.

A more convincing utterance on the subject is that of Lord Chief Justice Eyre in Howell's State Trials, in the case of *Reg. v.*

Thomas Hardy, 24 How. 214. That primate in the field of criminal jurisprudence delivers himself in these words: "It will be your duty to examine them (the facts) in a regular judicial course, that is, by hearing the evidence, and forming your own judgment upon it." In a fresh connection, he observes: "I am apprehensive that I shall not be thought to have fulfilled the duty which the judge owes to the grand jury, when questions in the criminal law arise on new and extraordinary cases of fact, if I did not plainly and distinctly state what I conceive the law to be, or what doubts may arise in law, upon the facts that are likely to be laid before you, according to the different points of view in which those facts may appear to you." Again, as to the withdrawal of considerations of fact from judicial examination, he proceeds:—"My present duty is to inform you what the law is upon the matter of fact, which, in your judgment, shall be the result of the evidence." This point he impresses anew: "Upon this last statement of the facts of the case, I am not called upon, and therefore, it would not be proper for me to say more." His luminous exposition terminates as follows:—"Gentlemen, I dismiss you with confident expectation that your judgment will be directed to those conclusions which may clear innocent men from all suspicions of guilt, bring the guilty to condign punishment, preserve the life of our gracious Sovereign, secure the stability of our government, and maintain the public peace, in which comprehensive term is included the welfare and happiness of the people under the protection of the laws and liberties of the people."

But the most sweeping determination on the question before us is furnished by a United States case, *Shattuck v. State*, 11 Ind. 473, where Hanna J., in delivering judgment in the Circuit Court, says: "By that law and practice (the English Common Law) from which we derived the main features of our grand jury system, the jury could call upon the prosecuting attorney for legal advice. But under that law and practice the advice given by the Court or prosecutor could not legitimately be upon questions of fact, but was confined to questions of law."

It may be added that Dickenson's Quarter Sessions, a guide whose reliability can be vouched for, lends its high authority to the proposition that the counsel which a judge, as expressed by this decision, may afford the grand jury, on request by them, should be

the sphere of law. It announces, "if any doubts occur of law, or with respect to the propriety of admitting any evidence offered to them, they should come into Court, for the advice of the Chairman or Recorder."

Ex v. Nelson and Brand, the historic Jamaica riots affair, Justice Cockburn, in explaining with great fulness and *raison d'être* of martial law in a colony, and estimating the nature and extent of disorder that would justify its application, might at first glance seem, here and there, to have oversteered the canon set up in this regard; and to have charged too heavily on the prisoners. The writer is unable, however, to perceive that he does more, at any time, than elucidate mixed questions of fact and law which the exigency of the hour supplied in his own Language of his own, just before concluding his summary of the subject, confirms this understanding: "I am, it may be that all I have said upon the subject of the law has left you, as I own candidly it still leaves me, not without the advantage of judicial authority to guide me, nor of argument and disputation to instruct me, in some degree. Let me therefore add that if you are of opinion, upon the facts, that the jurisdiction to exercise martial law is not clearly made out, and that it is a matter which ought to be referred to further consideration, on the trial of the accused in a competent court, where all the questions of law incident to the facts and decision of the case may be fully raised and fully and definitely considered and decided, I must say that the safe course will be to let this matter go forward. If, upon the review of the authorities to which I have called attention, and of the enactments of the Jamaica statutes, and the constitution and reservation of the power of the Crown in the Jamaica Parliament, you think the accused ought not further to be committed to criminal proceedings, and that the case against them ought not to be submitted to the consideration of a jury, you will be ignoring this indictment."

The doctrine being as jurists lay it down, did not the learned Judge in the Kennedy case, by dwelling (if the newspaper reports are correct) on various tokens of guilt, stray from the path marked out for him by the Judge of Assize in respect of his duty to the jury. It is, as the writer does, the faculty of discrimination which the sole occupant of the Bench applies to matters claiming

his attention, this criticism of his action on that occasion is offered with much diffidence. It is difficult, however, to see what other effect his treatment of the facts as then elicited could have than to induce the panel to give a sinister complexion to the matters canvassed.

While exhorting them, more than once, to exercise their own judgment, his comments on the evidence likely to come before them would, it is submitted, tend to influence that judgment; and any prejudicial utterances would scarcely be neutralized by his admonitions. In *Reg. v. Coleman*, 30 O.R. 93, damage from the improper calling of the attention of a jury to the neglect by a prisoner to testify on his own behalf was held not to have been rectified by a subsequent mention of the error.

Ad quæstionem facti respondent juratores; ad quæstionem juris respondent judices is maintained by Sir Michael Dalton, in his elaborate work on Justices of the Peace, to be as true with regard to the grand, as the petit jury.

J. B. MACKENZIE.

Correspondence.

TORONTO, March 11, 1904.

To the Editor CANADA LAW JOURNAL:

DEAR SIR,—It should be unnecessary to call attention to the ridiculously inadequate telephone accommodation at Osgoode Hall. A little money spent in making this more complete would be a great boon to the members of the profession who have to do business there. There should be a switch board to connect with the principal departments as is usual in all up-to-date business establishments. Surely this convenience is not still too modern to commend itself to the highly respectable but somewhat conservative element that has charge of such matters in that venerable institution.

Yours truly,

SOLICITOR.

ENGLISH

EDITORIAL REVIEW OF DECISIONS

(Registered in accordance with the

COMPENSATION FOR INJURY TO PROPERTY
ACTION ARISING FROM TORT—RIGHT OF
SUE IN HIS OWN NAME—JUD. ACT 187
JUD. ACT, S. 58 (5)).

In *Dawson v. Great Northern*
plaintiff was assignee of a claim for
certain houses were entitled to
company, owing to a subsidence c
ected a tunnel under their statuto
ad been incurred the claim, togeth
een injured, had been assigned to
the provisions of a statute, got
idley, J., and a jury, and the pl
cover the damages so assessed.

is was not a chose in action whi
able the assignee to sue in his o
d dismissed the action. In *King*
2, the Judicial Committee of the
to recover damages for negligence v
to recover which an assignee
seems to be another instance i
ion between our final Court
lish Courts as to what is the la

HUSBAND AND WIFE—PRACTICE—ACTION
WIFE'S TORT—PLEADING—PAYMENT IN
RULE 255—(ONT. RULES 419, 420).

Beaumont v. Kaye (1904) 1 K.L
band and wife to recover damag
the wife. The husband paid n
the claim, and the wife put in
el. The plaintiff moved to strike
the English Rule 255 payment int
nying liability is not permitted i
therefore struck out the wife's de

(Collins, M.R., and Romer, L.J.,) held that he was right. But this decision would appear not to be applicable to the practice in Ontario, where payment into Court and a denial of liability is allowed even in actions of libel: see Rules 419, 420.

SHIP—BILL OF LADING—EXCEPTIONS—WARRANTY OF SEAWORTHINESS.

Borthwick v. Elderslie S.S. Co. (1904) 1 K.B. 319, was an action by the holders of a bill of lading to recover damages for damage to the goods (frozen meat) occasioned by the ship being tainted with carbolic acid. The bill of lading contained a clause exempting the shipowners from liability from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any cause whatever, whether arising from a defect existing at the commencement of the voyage, or at the time of the shipment of the goods or not, or for any act, negligence, default or error of judgment of the master or officers of the ship, or "from any other cause whatsoever." It also contained a clause exempting the shipowners from liability for damage occasioned by any cause beyond the control of the owners or charterers, or from any defects, latent or otherwise, in hull, tackle, etc., whether or not existing at the time of the goods being loaded, or the commencement of the voyage, "if reasonable means have been taken to provide against such defects or unseaworthiness." On a previous trip the ship had carried horses, and a large quantity of carbolic acid had been used for disinfecting purposes before the meat was shipped. When the ship arrived at her destination the meat was tainted with carbolic acid. Walton, J., who tried the action, held that the damage arose from the condition of the ship at the commencement of the voyage and that if proper care had been taken in cleansing the ship the damage would not have occurred, but he held that the defendants were exempt from liability under the first clause and dismissed the action. On appeal, however, the Court of Appeal (Lord Alverstone, C.J., and Collins, M.R., and Romer, L.J.,) reversed his decision on the ground that the loss was due to the unseaworthiness of the vessel, and that the implied warranty of seaworthiness must be held not to be excepted by the conditions of a bill of lading unless it plainly appears that it was intended to except it; that in the present case it did not so appear; and that the general words of the exemption clauses were restricted to matters ejusdem generis as the preceding words, viz., failure or breakdown of machinery, etc.

IT"—DISEASE CONTRACTED FROM HANDLING INFECTED WOOL.

Wells v. Campbell (1904) 1 K.B. 328, may be noted as giving definition of an "accident." The plaintiff was a workman in a wool combing factory, and in the course of his employment had contracted anthrax from handling wool infected with anthrax bacillus. The question was whether this could be "a personal injury by accident" in the course of his employment. The County judge who tried the case thought not; but the Court of Appeal (Collins, M.R., Mathew, and Cardozo, L.J.), following *Fenton v. Thorley* (1903) A.C. 443, held that it was "an unlooked for mishap, or an untoward event which is not expected or designed," and, therefore, an accident within the meaning of the Workmen's Compensation Act, 1897.

COVENANTS—ASSIGNMENT OF REVERSION—LIABILITY OF ASSIGNOR OF LEASE—COVENANTS IN LEASE—32 HEN. 8, C. 34, SS. 1, 2.—(R.S.O. C. 330, SS. 12, 13).

Wells v. Joy (1904) 1 K.B. 362, was an action brought by the plaintiff against their lessor for damages for breach of a covenant contained in the lease. The covenant was one which ran with the lease, and the lessors had assigned the reversion, and the simple question was whether they remained liable on their covenant notwithstanding the assignment, and the Court of Appeal (Lord Alverstone, L.C., Lord Alverstone, C.J., and Cozens-Hardy, L.J.) held that they did, and affirmed the judgment of Wright, J., in favor of the plaintiff. Cozens-Hardy, L.J., says: "I assume, in favor of the appellants, that the covenant to execute repairs on the leased premises in obedience to the award to be made was a covenant running with the reversion to which the statute 32 Hen. 8 (R.S.O. c. 330, ss. 12, 13) applies. If so, s. 2 (Ont. Act s. 330) gives the lessees a right of action against the assignees of the lessors for breach of the covenant. But it is difficult to see why the statute should release the lessors from the express covenant, and nothing in the language of the section to lead to this conclusion."

LIQUOR LICENSE ACT—KEEPING OPEN DURING PROHIBITED HOURS—LICENSING ACT—37 & 38 VICT. C. 49) S. 9—(R.S.O. C. 245, S. 54).

Commissioners of Police v. Roberts (1904) 1 K.B. 369, was an action under the Liquor License Act, 1874, s. 9, for keeping open license premises during prohibited hours. The evidence

was that there was singing going on on the premises for eight minutes after the appointed hour, and within fifteen minutes after the appointed hour for closing thirty-eight persons came out of the premises. The doors were closed at the proper time, and there was no evidence that anyone was admitted or served with liquor after the appointed time. The justices dismissed the information, but stated a case. The Divisional Court (Lord Alverstone, C.J., and Lawrance and Kennedy, JJ.) dismissed the appeal, holding that in order to justify a conviction there must be a keeping open of the premises in the sense that people can get in from the outside to have intoxicating liquor, or that they can get it supplied to them when outside.

DEBT — ASSIGNMENT — REQUEST BY CREDITOR TO DEBTOR TO AGREE TO PAY DEBT TO THIRD PARTY—JUDICATURE ACT 1873, s. 25, SUB-S. 6.—(ONT. JUD. ACT, s. 58 (5).)

In *Brandts v. Dunlop Rubber Co.* (1904) 1 K.B. 387, the facts stated in the report are somewhat complicated, but are really quite simple. The plaintiffs were sureties for a firm of Kramrisch & Co., who had sold a quantity of rubber to the defendants, and at the plaintiffs' request Kramrisch & Co. addressed a letter to the defendants requesting them to agree to pay the price to the plaintiffs for Kramrisch & Co.'s account. The defendants' manager without authority signed an agreement to that effect, and the defendants in ignorance of what he had done, paid the price to Kramrisch & Co., who had since become bankrupt. The plaintiff contended that the request of Kramrisch & Co. to the defendants to agree to pay the plaintiffs was an assignment of the debt to the plaintiffs, entitling them to sue therefor in their own names, under the Jud. Act, s. 25 (6), (Ont. Jud. Act, s. 58 (5)), but the Court of Appeal (Lord Alverston, C.J., Collins, M.R., and Romer, L.J.) were of opinion that the document relied on did not amount to an assignment of the debt, and the judgment of Walton, J., in favour of the plaintiff was reversed.

CARRIER — CONTRACT — EXEMPTION FROM LIABILITY FOR LOSS OF GOODS WHICH CAN BE COVERED BY INSURANCE—NEGLIGENCE OF CARRIER.

Price v. Union Lighterage Co. (1904) 1 K.B. 412, was an action against carriers for loss of goods entrusted to them: the contract exempted the defendants from liability for "any loss or damage to goods which can be covered by insurance." The goods were

order of the sanitary authority at a cost of £83 10s., which he claimed to recover from the defendant as an outgoing. The Court of Appeal (Collins, M. R., and Romer and Mathew, L.JJ.,) were clear that it was, and that the tenant was liable therefor, and affirmed the judgment of Wright, J., in the plaintiff's favour, though expressing some sympathy for the defendant.

MARITIME LAW—SALVAGE—VALUE OF SALVED VESSEL FOR PURPOSES OF AWARD.

The Germania (1904) P. 131, was a claim for salvage in which the question to be determined was the value of the salved vessel for the purposes of the award of salvage. The plaintiff's steamer had fallen in with the *Germania* in distress off the coast of Scotland and about thirty miles from Aberdeen bay. The *Germania* was taken in tow and brought to Aberdeen bay, and the master of the plaintiff's steamer then suggested that a tug should be engaged to take her into the bay. Not being able to come to terms with a tug the master of the plaintiff's ship was directed to take the *Germania* in, but the hawser parted. The *Germania's* anchor failed to hold and she was driven ashore. Before going ashore she was worth £8,500, but the expense of floating her off and repairing her amounted to £6,750, and her owners claimed that for salvage purposes her value should be taken as £1,750. Barnes, J., however, held that it was a case of towage and that the plaintiffs were entitled to salvage on £8,500, the value at the time the vessel was safely brought within reach of the tug, the subsequent calamity to the vessel not being attributable to the plaintiffs.

EVIDENCE—REGISTER KEPT PURSUANT TO STATUTE—DATE OF BIRTH.

In re Goodrich, Payne v. Bennett (1904) P. 138, Jeune, P.P.D., held that the certified copy of an entry in a register of births kept pursuant to a statute is evidence, not merely of the fact of birth, but of birth on the date therein mentioned.

HUSBAND AND WIFE—DESERTION—CONDONATION.

Williams v. Williams (1904) P. 145, was an appeal from an order made by justices at the sessions. The proceedings were instituted by a wife for a judicial separation on the ground of desertion, and during an adjournment of the hearing of the summons, the complainant resumed cohabitation with her husband

£1,500. By deed of 21 April, 1842, George Ridley, a subsequent owner of the same estate, mortgaged the equity of redemption and certain additional land to one William Nicholas to secure £2,500. Nicholas paid off the first mortgage and took an assignment to himself in 1874, and by the same deed Samuel Ridley, who was tenant for life of all the mortgaged property, covenanted with Nicholas to pay the principal and interest of the first mortgage, but reserving his rights as surety against the owners of the mortgaged estates, and stipulating that as between him and them the lands should be deemed the primary security and his covenant only a collateral security. The representatives of Nicholas brought the present action against the representative of Samuel Ridley on his covenant, and against the owners of the equity of redemption for foreclosure. The representative of the covenantor Samuel Ridley claimed that on payment of the first mortgage he was entitled to an assignment thereof, claiming as between himself and the plaintiffs to stand in the position of a surety. The plaintiffs, on the other hand, contended that they were not bound to assign one mortgage without being also paid the amount due on the other. Byrne, J., who tried the action, considered that it was governed by *Farebrother v. Wodehouse* 23 Beav. 18, and that the plaintiff's contention must prevail, and that, although Samuel Ridley's representatives stood in the position of sureties, their rights as sureties could not interfere with the plaintiff's right to tack or consolidate their securities. On appeal Williams, L.J., agreed that they were sureties, and considered that the only way their rights could be carried out in accordance with the covenant given by Samuel Ridley was by an assignment to them of the first mortgage on payment thereof: Stirling and Romer, L.JJ., however, affirmed the judgment of Byrne, J., but on the ground that Samuel Ridley was not a surety as between himself and Nicholas, but a principal debtor. The case, therefore, presents quite a conflict of judicial opinion. Per Byrne, J., Samuel Ridley was a surety, but his rights as surety could not interfere with the plaintiff's right to consolidation. Per Williams, L.J., Samuel Ridley was a surety, and the plaintiffs were not, owing to the terms of his covenant, entitled to consolidate their securities as against him. Per Stirling and Romer, L.JJ., Samuel Ridley was not a surety as regards the plaintiffs, but a principal debtor, ergo plaintiffs had a right to consolidate their securities as against him.

Ex. Court.]

[Feb. 16.

ATTORNEY-GENERAL FOR MANITOBA v. ATTORNEY-GENERAL FOR CANADA.

Crown lands—Settlement of Manitoba claims—Construction of statute—Title to lands—Operation of grant—Transfer in præsenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.

The first section of the Act for the final settlement of the claims of the Province of Manitoba on the Dominion (48 & 49 Vict., c. 50) enacts that "all Crown Lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the province and enure wholly to its benefit and uses."

Held, affirming the judgment appealed from, (8 Ex. C.R. 337,) GIROUARD and KILLAM, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to the administration thereof and that the revenues derived therefrom enured wholly to the benefit and use of the Dominion. Appeal dismissed with costs.

Lewis, for appellant. *Newcombe*, K.C., for respondent.

N.S.]

DRYSDALE v. DOMINION COAL CO.

[Feb. 16.

Commissioner of Mines—Appeal from decision—Quashing appeal—Trial judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia on an application for a lease of mining land is quashed by the Supreme Court of the Province on the ground that it was not a decision from which an appeal could be asserted, the judgment of the Supreme Court is final and binding on the applicant and also on the commissioner even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable if the ground had not been stated.

In the present case the quashing of the appeal precluded the commissioner or his successor in office from afterwards claiming that the decision was appealable.

If the commissioner after such appeal is quashed refuses to decide again upon the application for a lease the applicant may compel him to do so by writ of mandamus.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., and *Mackay*, for appellant. *Lovett*, for respondent.

DAY v. DOMINION IRON AND STEEL CO. [Feb. 16.

— *Employers' Liability Act—Injury to servant—Proximate cause—R.S.N.S. (1900) c. 79.*

s engaged in moving cars at a quarry of the company. The aded at a chute under a crusher and had to be taken past an e about 200 feet away supported by a post placed seven and a from the track. D. having loaded a car found that it failed to al after unbraking, and he had to come down to the foot-board back the foot-rod connected with the brake. The car then he climbed up the steps at the side to get to the brake on top, shed between the car and the said post. He could have got on ar instead of using the steps or jumped down and walked along until it had passed the post. The manager at the quarry had l of the danger from the post, but had done nothing to obviate

versing the judgment appealed from, (36 N.S.R. 113,) DAVIES L. JJ., dissenting, that D.'s own negligence was the cause of his he company were not liable.

er DAVIES and KILLAM, JJ., that the position of the post was a e company's works under the Employee's Liability Act which e of negligence.

allowed with costs.

for appellants. *Harris, K.C., for respondent.*

MARKS v. DARTMOUTH FERRY CO.

[Feb. 16.

servant—Contract of service—Termination by notice—Incapa- servant—Permanent disability—Findings of jury—Weight of

a contract for service provided that it could be terminated by giving the other a month's notice therefor or by the employer e employee forfeiting a month's wages :

versing the judgment appealed from, (36 N.S.R. 158,) that ie employee by which he is permanently incapacitated from his service would itself terminate the contract.

iso, KILLAM, J., dissenting, that an illness terminating in the death and during the whole period of which he is incapacitated s a permanent illness though both the employee and his physi- d that it was only temporary.

le of the employer an employee was only to be paid for the actually on duty. One of the employees had accepted and eipt for a month's wages from which the pay for two days on s absent from duty was deducted, and his conversations with

other employees showed that he was aware of the rule but no formal notice of the same was ever given him. Having died after a long illness his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof.

Held, that such finding was against evidence and must be set aside.

Appeal allowed with costs.

Russell, K.C., and *McInnes*, for appellants. *W. B. A. Ritchie*, K.C., for respondents.

N.S.]

PAZSON v. HUBERT.

[Feb. 16.

Constitutional law—Legislative Assembly—Powers of speaker—Precincts of House—Expulsion from.

The public have access to the Legislative Chambers and precincts of the House of Assembly as a matter of privilege only, under license either tacit or express which can be revoked whenever necessary in the interest of order and decorum.

The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting.

A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed.

Judgment of the Supreme Court of Nova Scotia, (36 N.S.R. 211,) reversed and a new trial ordered.

Appeal allowed with costs.

Newcombe, K.C., and *McInnes*, for appellant. *Lovett* and *Glyn Osler*, for respondent.

N.S.]

MCLENNAN v. DOMINION IRON AND STEEL CO. [Feb. 16.

Expropriation of land—Statutory authority—Manufacturing site—Survey—Location—Trespass.

The Town of Sydney was empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the Dominion Iron and Steel Co., a plan shewing such location to be filed in the office for registry of deeds and on the same being filed the title to said lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass claiming that it included five chains belonging to him, and at the

Reports and Notes of Cases.

of such action the main contention was as to the boundary
ing. He obtained a verdict which was affirmed by the full court
Held, reversing the judgment appealed from, (36 N.S.R. 28,) the
question to be decided was whether or not the land claimed by him
of that indicated on the plan filed, that the sole duty of the engi
to lay out the land which the town intended to expropriate
er it was M.'s land or not was immaterial as the town could t
ut regard to boundaries. Appeal allowed with costs.
Lovett, for appellants. *Newcombe*, K.C., and *McInnes*, for respon

BEAUCHEMIN v. ARMSTRONG.

[Fe

Appeal—Jurisdiction—Amount in controversy.

Where the Court of King's Bench affirmed the judgment o
rior Court dismissing the action but varied it by ordering the c
to pay a portion of the costs:—

Held, that though \$2,117 was demanded by the action the defe
to appeal to the Supreme Court of Canada as the amount of the
n he was ordered to pay was less than \$2,000. *Allan v. Pra*
Cas. 780, and *Monette v. Lefebvre*, 16 S.C.R. 387, followed. A
ed with costs.

Laflamme, for motion. *Perron*, contra.

ST. LOUIS v. CITIZENS' LIGHT AND POWER CO. [Ma

n—Confession of judgment—Pleading—Estoppel by record—M
al corporation—Contract—By-law—Resolution of council—Que
of fact—Concurrent findings in courts below.

A confession of judgment, for a portion of plaintiff's claim, is a ju
ssion of the plaintiff's right of action and constitutes complete
st the party making it. Judgment appealed from reserved and
at the trial (Q.R. 21 S.C.R. 241) restored: *Hudon Cotton Co. v. Ca*
ing Co., 13 S.C.R. 401, followed: *Great North-West Central R*
arlebois (1899) A.C. 114; 26 S.C.R. 221, distinguished. A
ed with costs.

R. C. Smith, K.C., for appellants. *Bisaillon*, K.C., and *I*
llon, for respondents.

EXCHEQUER COURT OF CANADA.

Burbidge, J.]

SPILLING v. O'KELLY.

[March 7.]

Trade-mark—Infringement—Prior use—"King" cigars—Application to rectify register—Counterclaim—Title in trade-mark—Defence.

1. A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trade-mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings. *Spilling v. Ryall*, 8 Ex. C.R. 195, explained.

2. An application to rectify the register of trade-marks cannot be made by counterclaim. (Secus now, under General Order of 7th March, 1904; sic.)

3. In an action for the infringement of a trade-mark, the defendant may attack the legal title of the plaintiff's to the exclusive use of the trade-mark they have registered. *Partlo v. Todd*, 17 S.C.R. 196, referred to; *Provident Chemical Works v. Canadian Chemical Manufacturing Co.*, 4 O.L.R. 548, approved.

R. G. Code, and *E. F. Burrill*, for plaintiffs. *W. R. White*, and *A. W. Fraser*, for defendant.

Burbidge, J.]

[March 7.]

GORHAM MANUFACTURING CO. v. P. W. ELLIS & CO.

Trade-mark—Infringement—Sterling silver "hall-mark"—Right to register when goods bearing mark on Canadian market.

1. If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for anyone to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade-marks, but marks used to comply with statutes of the country of origin would not in that respect in any way alter the case.

Quære, Whether anyone would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks?

2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to the goods manufactured by

from sterling silver, which, it was
mark," or a hall-mark, as to be ca
c., and it appeared that during
ng such mark, were upon the C
ish hall-mark " were also upon the
Held, that the plaintiff could not,
exclusive right to the use of such m
Aylesworth, K.C., and *C. A. Mos*
ell, K.C., and *Fashen*, for defend

Province of

COURT OF

el, J. RE WILL
te of limitations—Promissory n
account—Equity of res

After the expiration of six years fro
the maker wrote to the payee's ac
debtedness on the notes so as to j
utations, and that in no event wou
e or no statute the debt was or
y. He enclosed a letter to the pa
ed to acknowledge his liability t
nowledgment was made by him to p
utions. The maker died a couple
Held, that the claim was taken out
principal and also as to interest d
but also after maturity, by way c
A bank has a lien on all moneys,
general balance of a customer's a
two promissory notes of a custom
and secured by an endorser,
out any endorser, upon which a cus
paid on the endorsed note. On
t balance in his favour in the banl
ent of the unendorsed note.

Held, that the bank was justified i
ared at such time that the custom
The testator in his lifetime purc
gage, which he assumed, but subs
ich his wife joined to bar dower a
s procured a further mortgage o
d to bar dower. He subsequently

sale of the property for \$16,000, receiving \$500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of \$2,150.52.

Held, that the wife was only entitled to dower out of the residue of the estate after satisfying the charges; and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein.

Marsh, K.C., for prisoner. *Mowat*, K.C., for Plaxton. *Wardrope*, K.C., for Standard Bank. *Ludwig*, for creditor.

From Police Magistrate.] REX v. WALSH.

[Jan. 5.

Indictable offence—Police magistrate—Summary jurisdiction—Election—Amendment after commencement of trial—Necessity for further election.

Appeal from the Police Magistrate at Hamilton. In order to give a Police Magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30 cents, not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election, either of being tried before him or by jury, must expressly name the court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner.

MACLAREN, J.A., dissented.

Regina v. Cockshutt (1898) 1 Q.B. 582, approved.

After the election by the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election and consents to be so tried.

Counsell and *E. N. Armour*, for prisoner. *Cartwright*, K.C., for Crown.

From Falconbridge, C.J.K.B..]

[Jan. 25.

RE PUBLISHERS' SYNDICATE.

Publishing company—Contract to supply books, etc., for a fixed period—Liquidation of company—Before expiration of—Damages for residue of period—Right to recover.

On payment of a subscription fee of \$10.50 to a publishing company certificates were issued by the company to the subscribers guaranteeing to such purchasers the privileges for five years of purchasing all books, magazines and periodicals and other printed matter at the price quoted in the company's catalogues and bulletins, but subject to ordinary trade

Full Court.]

BANK OF MONTREAL v. LINGHAM.

[Jan. 25.

Statute of limitations—Simple contract debt—Conversion into specialty debt—Payment or acknowledgment of debt—Evidence of.

Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed, after reciting the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustees to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the plaintiffs pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby after referring to the recitals in the deed of 1884, and reciting that the leases were given to save the expense of a sale, they released to the plaintiffs all their interest in the said lands, and subsequently \$5,500 was realized by the plaintiffs from a sale of a portion of the lands or the timber thereon.

Held, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the \$5,500 constitute a payment by the defendant on account of the debt, so that no bar was created by the running of the statute of limitations, and that it could, therefore, be validly set up by the defendant as a defence to an action brought by the plaintiffs in 1902.

MACLENNAN, J.A., dissented.

Walter Cassels, K.C., and A. W. Anglin, for appellants. Ritchie, K.C., and Northrop, K.C., for respondents.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] RE GRUNDY STOVE COMPANY.

[Feb. 3.

Winding-up — Material supporting petition — Necessity for proof of insolvency.

To enable a company to be wound up under the Winding-up Act, R.S.C. c. 129, it is not sufficient for the company to appear by counsel

insolvency and consent to be wound up, but the fact of such must be disclosed on the material on which the petition is

Hodgins, K.C., for the petitioner and the company.

C.J.C.P., Maclaren, J.A., MacMahon, J.] [March 19.

LAMBERT v. CLARK.

Court—Appeal from—Amount in dispute—Quashing appeal.

plaintiff brought an action in a Division Court for \$100.75, the a promissory note for \$64.87 and \$35.38 interest on it, and judgment for \$83.90; the trial Judge finding against an alleged up by the defendant, but only allowing \$13.13 for interest 35.38 as claimed. A motion for a new trial was refused. On o a Divisional Court, it was hat "the sum in dispute upon the appeal" under s. 154 of the orts Act, R.S.O. 1897, c. 60, was the \$83.90, and as it did not , a motion to quash the appeal was allowed. v. *Machan* (1897), 28 O.R. 504, distinguished. ton, for the appeal. C. A. Moss, contra.

Province of Manitoba.

KING'S BENCH.

] McDONALD v. FRASER. [Feb. 1.

land tenant—Distress—Second distress for rent due at date of first distress—Appraisement—Appraisers not sworn.

ndlord distrained on 2nd February for balance of rent due on nber preceding, and on 3rd February he put in a second a month's rent due on 29th January.

ollowing Woodfall on Landlord and Tenant, 16 ed, p. 523, ond distress, being for a different gale of rent, was not illegal. were appraised by two appraisers but they had not been quired by the Statute 2 W. and M., sess. 1, c. 5, and the plaintiff t the sale of the distrained goods was therefore illegal.

at, under 11 Geo. 2, c. 19, s. 19, the want of a sworn appraise- only an irregularity in the proceedings and that the plaintiff recover such special damages as he could shew to have d that he had shown none.

. *Tarlton*, 3 H.N. 116, and *Rodgers v. Parker*, 18 C.B. 112,

on, for plaintiff. *Mulock*, K.C., for defendants.

Full Court.

HUXTABLE v. COUN.

[Feb. 1.

County Courts Act—Interpleader—Plaintiff acting for bailiff in seizing goods under execution—Onus of proof at trial of interpleader issue—Estoppel—Sale of Goods Act.

At the trial of an interpleader issue in a County Court as to the ownership of certain wood seized under the execution therein by the plaintiff acting under authority from the bailiff and claimed by the claimant, it was contended on his behalf that the seizure was irregular and invalid because it was made by the plaintiff himself and not by the bailiff, also that the seizure had been abandoned, as, after notices being stuck upon the wood piles, no one had been left in charge. On appeal to this Court from a verdict in favour of the claimant,

Held, RICHARDS, J., dissenting:—

1. Under ss. 82, 83 of the County Courts Act, R. S. M. 1902, c. 38, the seizure by the plaintiff under the authority of the bailiff was not unlawful or invalid, although it is undesirable that such a practice should be followed. (Sec. 83 was amended at the session of 1904 so as to take away the right of the bailiff to employ other persons to execute warrants or writs for him.—Ed.)

2. The evidence did not shew that the seizure had been abandoned, as the plaintiff, after putting up the notices of seizure on the wood piles, had asked a person living near to look after the wood, and a week or two later the bailiff came himself and placed the same person in charge.

Per DUBUC, C. The property in the wood never passed to the claimant, for, although he had contracted to buy it from the judgment debtor and had paid him \$100 on account, it had not been measured and was not to be measured until brought by railway to Carman, and therefore under rule 3 of s. 20 of the Sale of Goods Act, R. S. M. 1902, c. 152, the property had not passed when the seizure was made. The plaintiff was not estopped from enforcing his execution by the fact that he had issued and served upon the claimant a garnishing order attaching any money that might have been due by the claimant to the judgment debtor on a sale of the wood, as he was entitled to take out the garnishing order as a precautionary measure in case it might be proved that there had been a valid sale.

Per PERDUE, J. Under s. 290 of the Act, it was not open to the claimant, on the trial of the interpleader issue, to raise any objections as to the validity of the seizure or as to its abandonment, but he could only take advantage of any such matter by making an application to set aside the interpleader summons; and, on the hearing of the latter, the judges should confine the investigation to the question whether the goods seized were the property of the claimant as against the execution creditor; and the onus rests on the claimant, in the first instance, of proving his ownership. If the bailiff attempts to take goods (not exempt) which he had no legal

erty to take, the claimant should, after protesting against the wrongful seizure, bring an action against the bailiff to recover the goods, or damages for their seizure. It would not be a case for interpleader, which is based on the hypothesis that a seizure under protest has been made by a bailiff or officer charged with the execution of the process. The claimant must establish his right to the wood, as the provisions of the Bill of Rights and Chattel Mortgage Act had not been complied with.

Per RICHARDS, J. 1. In the County Courts there is no preliminary application by the bailiff upon notice to the claimant for an order for the issue of an interpleader issue, but the bailiff takes out a summons and serves it on the claimant who is thereby required to attend at a certain time and place and "establish his claim" to the property seized, and it would be productive of great hardship and expense to the claimant if he were excluded on the hearing of this summons from raising any question as to the validity of the seizure and had to make a special application beforehand to the judge in order to get the interpleader summons set aside. He should therefore be allowed to raise the question at the trial of the interpleader issue.

2. The claimant had a contract for the purchase of the wood sufficient to satisfy the Statute of Frauds, and that gave him an interest in the property that entitled him to claim it as against the plaintiff, whose seizure was invalid, as he had no right to act as his own bailiff, and who for that reason was only a trespasser.

Appeal allowed with costs.

Howell, K.C., for plaintiff. *Huggard* for claimant.

COURT.] SCHOOL DISTRICT OF YOVILLE *v.* BELLEMERE. [Feb. 1.
*Public Schools Act, R.S.M., 1902, c. 143, ss. 32 and 243—Election of School
 trustees—Powers of inspector—Practice.*

This was an action of replevin to recover school furniture which had been taken away by the defendants after breaking open the door of the school house, defendants claiming that they were the legal trustees of the school district. In Dec., 1902, the trustees of the school district were Amable Clement, Joseph Proulx and Josephat Proulx, Clement being chairman of the board. Joseph Proulx had been elected a trustee on Jan. 1, 1901, and Josephat Proulx on Dec. 2, 1901. Sec. 32 of the Public Schools Act provides as follows: "When complaint is made to the inspector by any ratepayer that the election of any trustee for a rural school district, or that the proceedings or any part thereof of any rural school meeting have not been in conformity with the provisions of this Act, the inspector shall investigate the same and confirm or set aside the election or proceedings, and appoint the time and place for a new election, or for the reconsideration of a school question; but no complaint in regard to any election or

proceeding at a school meeting shall be entertained by any inspector unless made to him in writing within thirty days after the holding of the election or meeting." Under this provision the school inspector on Dec. 29, 1902, held an investigation in respect of the election of Clement which had taken place on the 1st of the same month. On this investigation the inspector called upon the other trustees to produce their declarations of office, and as these were not produced he declared both the Proulx not to be trustees and directed the calling of a meeting of the ratepayers for the election of two new trustees in their places. At the subsequent meeting of ratepayers so called two of the defendants were elected as trustees and they subsequently, with the other defendants, took away the school furniture referred to. These proceedings and this action were taken to settle the question whether such two defendants or the Proulx were lawfully two of the trustees of the school district.

Held, that, under the above quoted section of the Public Schools Act, the inspector had no power to investigate or decide upon the right of the Proulx to hold the office of school trustees, as the declaration of office is no part either of the election of the school trustee or of the proceedings at the school meeting. It is true that, under s. 243 of the Act, the neglect or refusal of a trustee to take the declaration of office within one month after his election is to be construed as a refusal, and that after such refusal another person should be elected to fill the place, but no power is given to the inspector to unseat a trustee for any such neglect or refusal. The two Proulx therefore still remained the legally qualified and acting trustees and the election of two defendants who claimed to be trustees was illegal and void, and they were guilty of a trespass in seizing and removing the school furniture.

Quære, whether the defendants could set up a defence to an action brought, as this was, in the name of the school corporation, the acknowledged owners of the goods. Their proper course would have been to apply to the County Court Judge to stay proceedings in the action or to have it dismissed on the ground that the use of the name of the corporation as plaintiff was not authorized by those who were lawfully the trustees.

Appeal from judgment of the County Court allowed with costs, and verdict entered for plaintiff in the County Court for the goods and \$5.00 damages, with the costs of the action in the County Court.

Munson, K. C., and Laird, for plaintiffs. *A. J. Andrews and Joseph Bernin*, for defendants.

Richards, J.]

SHIELDS v. ADAMSON.

[Feb. 15.

Practice—Parties to action—Amendment—Fraudulent conveyance.

This action was brought against defendant alone for the sale of land vested in the defendant's wife by an unregistered deed, and which the plaintiff claimed was bound by a registered certificate of judgment against

Full Court.]

MCKELLAR v. C.P.R. Co.

[Mar. 5.]

Railway—Obligation to fence—Liability for death of animal not actually struck by train or engine.

Verdict for plaintiff in a County Court for damages for the loss of a horse under the following circumstances: The horse got on the railway track through a defect in defendants' fence where the right of way passed through plaintiff's land, when a train came along and alarmed the horse which fled along the track for some distance and then rushed to the north side and tried to break through the fence. A strand of barbed wire from the fence became entangled round the horse's neck and cut it so badly that the horse was dead when found shortly afterwards. Sub-s. 3 of s. 194 of the Railway Act, as re-enacted by 53 Vict., c. 28, provides that, under such circumstances, "the company shall be liable to the owner of the animal for all damages in respect of it caused by any of the company's trains or engines."

Held, on appeal to this Court, that the death of the animal could not be said to have been "caused by" the train within the meaning of that enactment, but was caused by its coming into contact with the barbed wire, and that the liability of the railway company is limited to cases where the animal is actually struck or run over by a train or engine. Dicta of the judges in *Young v. Erie and Huron Ry. Co.*, 27 O.R. 530, and *James v. G.T.R. Co.*, 1 O.L.R. 127, 31 S.C.R. 420, and decision in *Winspear v. Accident Insurance Co.*, 6 Q.B.D. 42, followed.

Appeal allowed and nonsuit ordered.

Hoskin, for plaintiff. *Aikins*, K.C., and *Thompson*, for defendants.

Full Court.]

BERGMAN v. BOND.

[Mar. 5.]

Medical profession—Electro-therapeutics, a branch of medicine, but massage not.

Verdict in a County Court for \$250 for his services as an electro-therapeutist and massagist. Sec. 62 of the Medical Act, R.S.M. 1902, declares that it shall not be lawful for any person not registered under the Act to practice medicine, surgery or midwifery for hire, gain or hope of reward, and s. 63 of the same Act provides that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice or for attendance, or for the performance of any operation, or for any medicine he may prescribe or supply, unless he be registered under the Act. The plaintiff was not registered under the Act.

Held, on appeal to this Court, that electro-therapeutics is a branch of medicine, and a person who administers treatment of a patient by means of electricity thereby practises "medicine" within the meaning of the Act and cannot recover any charges therefor without being registered under the Act. Practising massage by itself is not practising medicine within the meaning of the Act. Appeal allowed with costs.

A. C. Ferguson, for plaintiff. *H. A. Robson*, for defendant.

Court.
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Province of British Columbia.

SUPREME COURT.

Drake, J.] IN RE PEARSE ESTATE. [Feb. 17, 1903.

Mortmain Act—Whether in force in B. C.—Probate duty.

Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will.

Held, 1. The statute, 9 Geo. II., c. 36, relating to charitable uses and commonly known as the Mortmain Act, is not in force in British Columbia.

2. Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate.

Note:—In *Re Brabant* in 1889, Gray, J. held the Mortmain Act not to be in force in B.C., and in *Sweetman v. Durieu*, Walkem, J. gave a similar decision in 1897. Neither decision was reported.

Full Court.] NORTH VANCOUVER v. KEENE. [Nov. 20, 1903.

Municipal corporation—Officer of—Tenure of office—Removal of officer—Tax sale—Commission on proceeds.

Appeal from judgment of HENDERSON, Co. J., dismissing plaintiff's action and giving defendant judgment on counter claim. Defendant had been treasurer of the municipality and on a dispute arising about his right to charge commission on the purchase price of lands sold at a tax sale he paid himself out of the funds contrary to orders and was dismissed without notice.

Held, allowing the appeal, that under s. 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the Mayor or Council," and so may be removed at any time without notice or cause shewn therefor.

A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected :

Held, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands the collector was not entitled to a commission on the price of lands so bid in.

Williams, K.C., and *Heisterman*, for appellant. *Wilson*, K.C., Atty.-Gen., for respondent.

Full Court.] CENTRE STAR v. ROSSLAND MINERS' UNION. [Jan. 6.

Venue—Change of—Convenience—Fair trial.

The writ was issued in Rossland where all parties resided. The venue was laid in Victoria and defendants applied on the ground of greater con-

Reports and Notes

ence for a change of venue to Rossland
use a fair trial by jury could not be ha
g the mining classes. Defendants
on where they contended a fair trial co
vits to show that the feeling was the s
e change to Nelson was made by For
Held, on appeal, reversing the order,
at Nelson would be less than at Victor
ged unless it was clear that an absolut
M. C. Galt, for appellants. S. S. Tay

Lo. J. S. C.] IN RE LEE S.
ese Immigration Act, 1900—Deportati
tance to United States—H
Application for habeas corpus.

Held, that where a Chinaman, who
any for his passage from China throug
he understanding that if he is refu
ll be deported to China by the compa
s and is being deported, he will no
as corpus proceedings as the contrac
ese Immigration Act, 1900, deportatio
E. A. Jenns for applicant. R. L. R
hall for other parties.

UNLICENSED CONV

The Bill prepared by the Special Com
is subject, and known as "The Coi
e motion for a second reading in the C
Whilst it is to be regretted that the
ght to be beneficial in its provisions b
l standpoint, did not pass into law, th
st) must be regarded as most encourag
ng remark that the Premier, The Atte
ducation all voted for the Bill, which
essrs. H. Carscallen, of Hamilton, and
The subject is a very difficult one, but
if it had carried, would have been pe
ious and troublesome question; and it
nerson, chairman of the Benchers Spe

gentlemen associated with him on the Committee, will see to it that the House be given another opportunity of pronouncing on the Bill next session.

The names of the members of the Legislature who voted against the Bill are as follows:—Messrs. Auld, Barr, Beatty, Brown, Burt, Carnegie, H. Clark, Davis, Dickenson, Downey, Dryden, Duff, Eilber, Ewanturel, Fox, Gallagher, Graham, Guibord, Hislop, Holmes, Hoyle, Jessop, Joyest, Lackner, Lee, Michand, Munro, McCart, Macdiarmid, McLeod, Pardo, Pettypiece, Preston, Richardson, Rickard, Routledge, Spock, Stratton, Sutherland, Taylor, Thompson, Truax, Tucker, Whitney.

Flotsam and Jetsam.

Chief Justice Story attended a public dinner in Boston at which Edward Everett was present. Desiring to pay a delicate compliment to the latter, the learned judge proposed as a volunteer toast: "Fame follows merit where Everett goes." The brilliant scholar arose and responded: "To whatever heights judicial learning may attain in this country, it will never get above one Story."

The Alaska Commission—A prophecy fulfilled—Sir Richard Jebb, M.P., one of the professors at Cambridge, a year ago published an article in *The Empire Review* which is of special interest in view of what has subsequently taken place. Speaking of the constitution of the Alaska Boundary Commission he says: "We can only hope that our Government has not, in a moment of panic, reverted to the old colonial policy of once more making Canada pay for our blunders beyond the Atlantic. Nothing would more effectively check the movement towards Imperial co operation than to ignore the right of Canada to guide Imperial policy in matters primarily affecting her special interests. That right was recognized by us once for all when four Canadians sat with one Englishman at Quebec to conduct Imperial negotiations with the United States. The same principle demands that in the present case all three British commissioners shall be Canadians. For the American contention will prevail if a single British commissioner can be won over to the American view; therefore to appoint a single Englishman would be unjust to Canada and impolitic for the Empire. For it would be intolerable to Canada if her claim, supported, perhaps, by two Canadian commissioners, were rejected in favour of the Americans by the third, who, being an Englishman, might be thought to have felt more interest in forcing a verdict of some kind than in supporting the claims of justice." This is just where Lord Alverstone put his foot in it, brought discredit upon the Bench and sacrificed Canadian interests.

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We are more than sorry to observe that, notwithstanding the oiling of the ways for confederation by the settlement of the French treaty shore question, Newfoundland sentiment is decidedly averse to joining with the Dominion of Canada. We hope and believe that this is only a passing phase of insular sentiment, susceptible of entire removal by judicious treatment by large-minded men in both colonies and in the mother country. The Imperial authorities can do much to persuade the people of Newfoundland that the whole trend of British interests is in the direction of such a union; and Canada cannot afford to dicker about the cost of "rounding-out" her Atlantic sea-board. The solution of the difficulty lies in the Britishers of North America following the recent example of their brethren in Australia and putting the great sentiment of Imperial patriotism before any smaller considerations, such as local jealousies and the laissez-faire policy of an antiquated colonialism.

There is but small satisfaction and little to be gained by attempting to criticise bills of provincial legislatures affecting the administration of justice, inasmuch as they either are strangled in infancy, or become law before there is time for more than perfunctory criticism. This is one of the many reasons why we deprecate this everlasting tinkering of statutes, referring especially in this regard to the Province of Ontario. It would be wisdom and save much public money if things were allowed to abide-a-wee. Frequent amendments, even in the line of probable improvement, which are merely experimental, generally do more harm than good.

The proposed changes in the Judicature Act are apparently aimed at relieving the Court of Appeal and throwing more work into the High Court. This is said to be desirable at the present juncture as the Court of Appeal is over-worked and the High Court Judges, with those recently appointed, have time on their

hands. The suggestion of making two divisions of the Court of Appeal, composed of three judges each (borrowing a judge from the High Court), has properly enough, perhaps, been abandoned. Shortly stated, it is proposed, in the bill before us, to send to the Divisional Courts for final adjudication all appeals from judgments of trial judges or single judges where the amount in dispute (except in certain specified cases) is under \$1,000. Before next session it may very possibly be found that this scheme throws too much work upon the High Court judges, or has some other injurious effect, or it may perchance be urged that it does not give litigants, whose smaller sums are as much to them as larger ones are to others, the recourse they ought to have to a fully constituted appellate tribunal, presumably of more weight and authority than three judges of the High Court.

The Toronto Bar Association has expressed to the Attorney-General the opinion of its members, who had the matter under consideration, that it would be advisable to give the appellant the option to print or typewrite appeal books, and to provide that the costs, whether the books are printed or typewritten, should be costs on the appeal in the discretion of the Court, and to be paid by the respondent, if so ordered, whether or not he had consented to the books being printed instead of typewritten. It was also suggested that it would be a great saving of time and an improvement in the present procedure if provision were made authorizing the appellate courts to make rules limiting the time allotted to arguments and giving the right to either or both parties to put in a written argument if so advised.

Members of the profession should always be glad of every effort to advance its interests in any legitimate way ; and for this reason we welcome the appearance of the Toronto Bar Association. It would seem to have within it the germ of usefulness, and we trust it may be carried on with energy and with due regard to its objects as set forth in the constitution. These are as follows : "To maintain the honour and dignity of the profession of the law ; to elevate the standard of integrity, honour and courtesy in the profession ; to cultivate the science of jurisprudence ; to promote

reform in the law, and increase its usefulness in the administration of justice ; to conserve and advance the interest of the profession, and to cultivate social intercourse and cherish the spirit of brotherhood among the members" The officers and trustees are well known and esteemed members of the profession and compose an energetic body of men from whose management good results should be obtained. It was thought by some that the formation of this association was in some way a reflection upon the County of York Law Association and might have the effect of weakening that organization. We should regret any such result, as the County Association has done good service in the past in the line of work in which it took a special interest, viz., the establishment and maintenance of an excellent local law library ; but any feeling of the sort indicated is happily passing away. There would appear to be room for both associations, and they will doubtless work harmoniously together for the benefit and advantage of the profession as a whole. The members of the new association have, we believe, been very active in connection with the effort made to solve the unlicensed conveyancing problem, and when anything practical has been accomplished in that direction the entire profession will be greatly indebted to them. There are many other ways in which such an organization can be helpful. We trust that the work of its officers may be continuous, and characterized by the energy exhibited in the inception of the undertaking. We are glad to see that the older society is now arranging for some informal social gatherings. A little wholesome and friendly rivalry in such matters will do no harm so long as all combine together to protect our interests against foes from without and traitors within. The executive of Toronto Bar Association is as follows : President, Christopher Robinson, K.C.; Vice-President, R. C. Clute, K.C.; Secretary, Thomas Reid ; Treasurer, James W. Bain ; Board of Trustees, Messrs. W. D. McPherson, Chairman ; Adam Ballantyne, Vice-Chairman ; Frank E. Hodgins, K.C., A. C. Macdonell, F. C. Cooke, E. J. B. Duncan, W. R. Smyth, W. B. Raymond, E. E. A. DuVernet, W. N. Ferguson, E. B. Ryckman, R. J. MacLennan, C. D. Scott, W. G. Thurston.

The great metropolis of Chicago has declared for municipal ownership of street railways. On the 5th of April the so-called Mueller Street Railway Act was accepted by the municipal electorate by a large majority of votes. The Mueller law was enacted by the Illinois legislature in May, 1903, and it empowers any city in the State to "own, construct, acquire, buy and operate" street railways as municipal property, upon its acceptance by a majority vote. The city, however, cannot raise the money to buy the railway property without statutory authorization; and a *modus vivendi* inhering in the question: "Shall the Council, instead of granting any franchises, proceed to license the street railway companies until municipal ownership can be secured, and to compel them to give satisfactory service?" was adopted by the Chicagoans by a vote of 120,181 yeas to 48,056 nays. Mayor Carter H. Harrison is not at all sanguine of the outcome of this venture of municipal ownership for the good people of his borough. He fears that "the unsatisfactory condition of Chicago's civil service, which of late has given rise to a succession of serious scandals, indicates that the addition of 10,000 street car employees to the municipal pay-rolls would be injurious to the city government, and would not render less acute the existing evils of the traction system."

The trouble is that municipal ownership demands a fine sense of probity if the people who exploit it would have it a success, and this fine sense does not at present exist. For our part we are distinctly of the opinion, formed after much enquiry and careful consideration, that municipal ownership, no matter how excellent it may appear in theory, in the present condition of things, political and municipal, would generally be disastrous to the interests of the state and lower still further the present low standard of public morality. What may be possible in England is not necessarily possible in this country.

INQUIRIES BY MAGISTRATES IN CAMERA.

The action of the Police Magistrate of the City of Woodstock in conducting behind closed doors the trials of participants in the cocking main, which last month attracted an unusual amount of public attention, reveals a most objectionable wresting of this magisterial authority from its proper objects. It would appear from that functionary's own admission, that, on assuming office in November last, he formed a compact with local newspapers, by which the name of any Woodstock resident whom he should try by virtue of his summary jurisdiction, whether that of a Justice of the Peace, or such as might be conferred specially, would be suppressed by them, if he, on his part, aided in the suppression of publicity by turning his court into a secret chamber. This certainly seems to be rather an amazing proposal.

Section 849 of the Criminal Code enacts that the room or place in which the Justice (a Police Magistrate is declared to fall within the definition) sits to hear and try any complaint or information shall be deemed an open and public court to which the public generally may have access, so far as the same can conveniently contain them.

With s. 586, sub-s. *d*, read in connection with this regulation, there ought to be nothing else required to establish the Magistrate's radical error. That provision is as follows: "A Justice, may (when holding a *preliminary* inquiry) in his discretion order that no person, other than the prosecutor and accused, their counsel, and solicitor, shall have access to, or remain in the room or building in which the enquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing." It would, therefore, appear that the compact, above referred to, provides for an exact reversal of these statutory directions, for by it privacy was to be observed in the case of persons to be tried *summarily*, and it is not part of the agreement that persons appearing before the Police Magistrate on *preliminary* hearings were to have the screen removed from their misdoings.

The genesis of trials in camera is but partially understood. The usage depends upon a rule of practice, not of law. In the Encyclopedia of the Laws of England it is affirmed "that notwithstanding changes in procedure, an English court of justice is,

in theory, open to as many citizens as can crowd into it without disturbing its proceedings." And in the same work, the information is vouchsafed that adult women and children will be excluded by order of the Court, where the subject of inquiry might unfold anything morally pernicious.

The present Lord Chief Justice of England, when Attorney-General, advised the Brewers' Society, in a well-considered opinion (See Stone's Justices Manual, 1904, p. 771), that Justices of the Peace could not, in ordinary cases, bar any one from hearings, unless he were obstreperous, and, in special cases, no more than a section of the public, namely, women and children, in matters of an indecent nature, as to which it would not be fitting to bring out the full details. To put it shortly, salacious diet was not to be furnished those to whom it could endanger. It will not be out of place in this connection to remark that no order of the Court of this description is, so far as adult women are concerned, enforceable by process.

Daubney v. Cooper, 10 B. & C. 240, determines that a Justice of the Peace, who caused a person not found to have misbehaved himself in such a way as to hinder or obstruct the proceedings to be ejected from a sitting of his court, was liable therefor in trespass. *Young v. Saylor*, 22 O.R. 513 (affirmed on appeal, 20 A.R. 645) is to the same effect. Bayley, J., pronouncing the judgment of the Court in *Daubney v. Cooper*, says:—"The ground upon which our present opinion is formed is that the magistrate was proceeding upon a summary conviction, and, therefore, exercising a judicial authority; and we are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on."

In *Reg. v. Justices of Hampshire*, 39 J.P. 101, a defendant obtained a rule nisi (the force of his objection would seem to have been admitted, since the case did not go further) for the purpose of quashing his conviction, made where the room in which the trial occurred was kept locked during its progress, and his friends, with others, to the number of 20 or 30, who were outside, had been refused admittance. Nor only this, for it has been laid down that

any member of the community whose rights have been violated by reason of a magistrate's departure from his line of duty may apply to the court (R.S.O. c. 88, s. 6) to compel him to proceed with a trial in accordance with law.

In *Collier v. Hicks*, 2 B. & A., Tenterden, C.J., says, at p. 668 : " This (being a case of a court proceeding on a summary conviction) is undoubtedly an open court, and the public had a right to be present, as in other courts." Park, J., remarks, at p. 671 : " All the king's subjects may be present."

Sir Frederick Pollock, in his address on the expansion of the Common Law, published in the *Harvard Law Review* says : " When we pass from the second to the third quarter of the nineteenth century, we find that the Parliament of Queen Victoria has taken a widely different course from the Parliament of King Philip and Queen Mary. The secret inquisitorial proceeding has become open and judicial ; there is no longer an examination of the prisoner, but a preliminary trial in court, the police court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever ; the feeling that judgment should be done in the light of day has been strong enough to reassert itself after a partial eclipse. . . In this we have a tradition which has persisted through all changes. Like other rules of patience, the rule of publicity is not quite inflexible ; some few exceptions are allowed on grounds of decency or policy, and in some jurisdictions they have been confirmed or extended by statute. . . The settled judgment of our ancestors and ourselves is that publicity in the administration of the law is on the whole—to borrow words used by my friend, Mr. Justice O. W. Holmes, in another context—" worth more to society than it costs."

In challenging the course of the magistrate in respect of these inquiries, the amendment of the Criminal Code of 1901, 550 a 2, has not been overlooked. There is no doubt that, with regard to the crimes and offences particularized (all of them cases where the matter of sex is concerned, and those ejusdem generis with them), the rule of practice as to excluding adult women and children only becomes superseded, and that every class of auditors may be turned out ; but the saving clause found in sub-s. 2 could have no operation here, for, even if the section, as a whole, embraced a Justice of the Peace, which admits of considerable doubt, the com-

mon law power sought to be conserved would in his case at any rate, consist of nothing beyond the right to exclude for unseemly behaviour, either directly or mediately by commitment as for contempt in face of the court.

It may be a question how far the compact between the parties hereinbefore referred to is an agreement to violate a statute, and legally a conspiracy. Of late there have been tentative casts of the judicial plummet in these waters, but there is some doubt whether bottom has been reached. In the case before us the principal actor is a lawyer, and, apart from any question as to the propriety of such a compact, he entirely misunderstood, according to our view, his position in the premises. It is quite true that the Attorney-General in answer to a question in the House, when the matter was brought to its attention, made an off-hand statement that the magistrate had the right to act as he did, but we venture to think that the Attorney-General did not take time to look into the matter.

ACTIONS FOR MALICIOUS PROSECUTION.

To what extent does opinion of counsel protect in actions of malicious prosecution?

For many years the respective functions of judges and juries as to the questions of the existence or non-existence of reasonable and probable cause, and the presence or absence of malice, in actions of malicious prosecution, have been definitely settled. Sometimes the judge lays down the factors that must co-exist in order to support the action, and directs a general verdict, either for plaintiff or defendant, in accordance as the evidence establishes on the one hand, or fails to establish on the other, the issues submitted for determination by the parties to the suit; in other words, that the finding of certain facts would or would not constitute reasonable and probable cause, and would or would not indicate malice, and that their verdict should be in accordance therewith. Or the judge directs specific findings on questions submitted by him, and on these findings will order judgment to be entered either for defendant or plaintiff, as he finds there was, or was not, reasonable and probable cause for instituting proceedings.

When the prosecutor has taken the opinion of counsel on facts submitted for his decision before laying information, another factor enters into the consideration of the question.

In 1813 it was held by the Court in *Hewlett v. Cruchley*, 5 Taunt., page 277, that in an action for malicious prosecution it is no answer that the defendant took the opinion of counsel in what he did, if the statement of facts was incorrect or the opinion ill-founded. Mansfield, C.J., on motion for a new trial, said: "But one would at least expect that the defendant, in order to purge himself by the testimony of the opinion of a barrister, ought to shew that he laid a most full statement of the case before him upon which he could form a full judgment of the propriety of the case." Heath, J., said: "It would, however, be a most pernicious practice if we were to introduce the principle that a man, by obtaining an opinion of counsel, by applying to a weak man or an ignorant man, may shelter his malice by bringing an unfounded prosecution."

Chief Justice Abbott, in *Ravenga v. Mackintosh*, 2 B. & C., p. 693 (1824), substantially charged the jury to find a verdict for the defendant if they were of the opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his legal adviser; but to find for the plaintiff if they were of the opinion he intended to use the opinion as a protection, in case the proceedings were afterwards called in question. Bayley, J., in delivering judgment on motion for a new trial, said: "I accede to the proposition that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

This question is set in clear light by the great leading case of *Abrath v. North Eastern Railway Company*, L.R. 11 Q.B.D. 440 (1893). Briefly summarized, the facts were these: The plaintiff, a medical doctor, had attended one Mr. McMann for injuries sustained in a collision in two trains upon defendant's railway. Principally upon the representations of the doctor, who described the injuries as of a most serious character, the defendants compromised Mr. McMann's claim for a large amount. In consequence of certain inquiries set on foot, it seemed to the company they had been made the victim of a conspiracy on the part of the doctor and his patient, the injuries being far less serious than

represented. The facts as disclosed were submitted by the directors of the company to counsel, and he advised that there was a good case for prosecuting a charge of conspiracy against both McMann and Dr. Abrath, his medical adviser. In addition to this, two eminent medical men were of the opinion that the case of the alleged injuries to McMann was a fabrication amounting to an imposture. Information was laid and Dr. Abrath committed for trial. He was acquitted, and thereupon brought an action of malicious prosecution against the defendants. The trial judge, Cave, J., left three questions to the jury: (1) Did the defendants, in prosecuting the plaintiff, take reasonable care to inform themselves of the true state of the case; (2) did they honestly believe the case which they laid before the magistrate; (3) were the defendants actuated by any indirect motive in preferring the charge against the plaintiff. The jury answered the two first questions in the affirmative, but gave no answer to the third, whereupon the judge upon these findings drew the inference of reasonable and probable cause, and directed a verdict to be entered for the defendants, and accordingly gave judgment for them. On appeal to the Queen's Bench Division, this judgment was set aside, and a new trial ordered. On appeal to the Court of Appeal, the judgment of the Court of the Queen's Bench Division was set aside, and the appeal from the order for a new trial allowed.

In his judgment in the Court of Appeal, Brett, M.R., characterized the charge of Cave, J., to the jury as most masterly. Among other things he said: "I wish I could express what I intend to say as clearly and as concisely as he stated this case to the jury. A summing up in an action for malicious prosecution I have never read which I more admired."

This model charge was as follows: "I think the material thing for you to examine about is whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves: Did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless, they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff

to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore I shall have to ask you that question along with the others, and according as you find one way or the other then I shall tell you presently, or I shall direct you whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices—then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question: Were they in what they did actuated by malice—that is to say, were they actuated by some motive other than an honest desire to bring a man, whom they believed to have offended against the criminal law, to justice? If you come to the conclusion that they did honestly believe that, then they are entitled again to your verdict; but if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict, and then it will become necessary to consider the question of damages.”

The divergence of opinion in this case between the Court of Appeal of the Queen's Bench Division and the Court of Appeal arose in a misconception, on the part of the former, as to the mode of proof. The Court of Appeal of the Queen's Bench Division held that the burden of proof was on the part of the defendants to establish probable and reasonable cause, since the facts necessary for such proof would lie peculiarly within their knowledge. That if it rested with the plaintiff, he would be called upon to prove a negative. Before this it was contended by many that when the plaintiff had proved the prosecution and that it had terminated favourably to himself, the burden was shifted upon the defendant, and consequently the plaintiff would be entitled to recover, unless the defendant could shew reasonable and probable cause for having prosecuted.

The result of this decision establishes the principle, that in actions of malicious prosecution the burden of proof throughout rests upon the plaintiff, as well to shew want of reasonable and probable cause, as to prove malice, although the knowledge of its existence lies peculiarly within the knowledge of the defendant.

Further, this case demonstrates how small a part the fact that defendants took the opinion of counsel before prosecuting played in its ultimate decision. It would seem, however, to follow as a legitimate inference, that taking the opinion of counsel as a precautionary measure may have been a material factor in leading the jury to find as they did.

It is only when the prosecutor acts bona fide upon the legal advice or opinion of counsel on facts apparently credible and fully disclosed to his counsel, and with a mind free from the taint of malice, his defence can be said to be assured. While the onus of proving malice rests upon the plaintiff, the jury may infer it from the want of reasonable or probable cause. Yet they are not bound so to do. On the other hand, however, the want of reasonable or probable cause cannot be inferred from proof of malice.

In *Alex v. Stewart*, 6 M.L.R., p. 264 (1889), Chief Justice Taylor is thus reported: "The law certainly seems to be now settled, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, he is not liable to an action."

In *St. Denis v. Shoults*, 25 O.A.C., p. 131 (1898), the court held that notwithstanding the prosecution was instituted on the advice

of counsel, it was not sufficient to protect the prosecutor, if he did not exercise reasonable care to ascertain the facts in reference to the alleged offence.

The question arose incidentally in *Horsely v. Style*, 9 Times L. R. 605 (1893). This was an action on the case brought to recover damages for the wrongful registration of an inventory and receipt as a bill of sale, which was not a bill of sale, whereby the plaintiff was injured as alleged in his credit. A verdict having been awarded plaintiff, on appeal to the Court of Appeal the verdict was set aside and judgment ordered to be entered for the defendant.

Lord Justice Esher, M.R., in delivering the judgment of the Court of Appeal, said: "That the defendant had used the law, which said that a person who was the grantee of a bill of sale could register it. The defendant had an inventory and receipt which his solicitor advised^o him should be registered as a bill of sale. The defendant, therefore, was using the law relating to bills of sale. It must be taken that he used the law erroneously. That was not enough to make him liable in this action. It must be proved that he used it maliciously and without reasonable and probable cause. It could not be said that there was a want of reasonable and probable cause, for his solicitor advised him to register it. Then as to malice, that was doing a thing from an improper and indirect motive. There must be actual malice. It was not enough that there should be legal malice, if there was a thing. The learned judge, therefore, was wrong in telling the jury that malice in fact was not necessary. In the present case all the witnesses had been called and no further evidence could be given, and no evidence of malice had been given. There was no use in sending the case for a new trial, and judgment must be entered for the defendant."

In *Peck v. Peck*, 35 N. B. R., p. 484, it was shewn the charge upon which plaintiff was arrested was made on the advice of counsel, but it was further shewn the defendants did not disclose the facts fully to him. A verdict having been found for the plaintiff, a rule for a nonsuit or new trial was refused by the court en banc.

The following general rules should be borne strictly in mind:

1. In actions for malicious prosecution, the plaintiff must allege and prove absence of reasonable and probable cause and

malice. The affirmative of these allegations is upon him. If he fails to establish both, he fails altogether.

2. The factors necessary on the part of the defence to establish reasonable and probable cause are threefold: first, belief of the accuser in the guilt of the accused; second, belief in the existence of the facts upon which he proceeded to prosecute; and thirdly, that such belief was based upon such reasonable grounds as would lead any fairly cautious man so to believe and so to act. Upon the findings of the jury on these points, the judge draws his inference and determines whether they disclose or not reasonable and probable cause. The inference of the judge is an inference of fact and not of law, drawn by him from the facts found by the jury and from all the circumstances of the case.

3. The malice necessary to be established is not malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact. Any indirect, sinister or improper motive would be malice in fact.

4. Taking the opinion of counsel before proceeding to prosecute amounts only to a circumstance, which the jury is bound to consider in determining whether the accuser was actuated by an honest and sincere desire to bring a guilty party to justice, or whether it was resorted to merely as a cloak to cover some covert or indirect purpose.

5. From want of reasonable and probable cause, malice may be inferred. The question then arises: Can the jury, for the purpose of determining the question of malice, draw themselves for such purpose the inference of the presence or absence of reasonable and probable cause? Such is the view put forward by Sir Henry Hawkins in his judgment in *Hicks v. Faulkner*, L.R. 8, Q.B.D. 167. At page 175 he is thus reported: "Absence of reasonable cause to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury; as evidence

of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interests of justice—in which case they ought not, in my opinion, to find the existence of malice. It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause—one by the jury and another by the judge—but such at present is the law."

6. The recognized distinction between actions for false imprisonment and malicious prosecution should be carefully observed. In false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence.

St. John, N.B.

SILAS ALWARD.

The murder of Gonzales in South Carolina by that brutal ruffian, Ex-Lieutenant-Governor Tillman, is doubtless in the memory of our readers. It is said that his acquittal was secured in the following ingenious manner. Shortly before the trial a number of his agents went through the county where the trial was to take place soliciting orders for the enlargement of photographs. The head of the family was always interviewed, and, as an example of the work that would be done, there was produced a picture of Tillman. This was used to bring on a conversation about the pending trial. The views of the possible jurymen were thus ascertained, and, being carefully noted, were reported to the prisoner's attorney. This work was done so thoroughly that the views of the whole panel were in his possession. When the trial came on those who were called as jurymen and known to be unfavourable to the prisoner were confronted with the statement, and, having expressed an opinion on the case, they were, according to United States law, ineligible for service as jurymen. A favourable jury was thus secured and the murderer escaped the hangman's noose which he so well merited. It will thus be seen that there are many things connected with the administration of justice in which our criminal lawyers are behind the age.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

 (Registered in accordance with the Copyright Act.)

COMPANY—DIRECTOR—FORFEITURE OF OFFICE—CONTINUING TO ACT AFTER FORFEITURE—FEES PAID TO DIRECTOR AFTER OFFICE FORFEITED—MONEY PAID BY MISTAKE—REPAYMENT OF FEES—LIEN—QUANTUM MERUIT.

In re Bodega Co. (1904) 1 Ch. 276. In this case a director of a joint stock company under the articles of association forfeited his office if he became interested in any contract with the company. Wolseley, one of the directors of the company, on 24th December, 1900, became secretly interested in such a contract. He continued to act as director and received fees for so acting, and in July, 1901, received £400 as special remuneration for his services as director. He continued interested in the contract till the end of June, 1901. At the general meetings in July, 1901, and 1902, he retired and was re-elected to the board. In February, 1903, his secret interest in the contract of 1900 was first discovered. He then ceased to act as director and sold his shares, and the company refused to register the transfer, claiming a lien on the shares for the fees paid him, including the special remuneration for services when he was not in fact a director. Farwell, J., held that Wolseley automatically vacated his office on becoming interested in the contract, but his disqualification ceased when his interest in the contract came to an end, and that his re-elections in July, 1901, 1902, were valid. He also held that the defendant was not entitled to any quantum meruit for his services as director between 24th December, 1900, and July 8th, 1901, but that the company were entitled to all fees paid him during that period as being moneys paid under mistake of fact, and was entitled to the lien they claimed on his shares for the amount so due from him.

PRACTICE—ADMINISTRATION—NEGLECT TO RENDER ACCOUNTS—COSTS OF TAKING ACCOUNT.

In re Skinner, Cooper v. Skinner (1904) 1 Ch. 289. Farwell, J., held that where trustees neglect and refuse to give a proper account without suit they may be ordered to pay the costs of proceedings by way of originating summons to compel them to

account, including the costs of taking and vouching their accounts: *Hewett v. Foster*, 7 Beav. 348; 64 R.R. 98, which decided that the costs of taking the account should be paid out of the estate, was held not to be in accordance with the modern practice.

ADMINISTRATION—WILL—FOREIGN BONDS—FOREIGN SHARES TRANSFERABLE ABROAD OR IN LONDON—LOCALITY OF ASSETS.

In re Clark, McKicknie v. Clark (1904) 1 Ch. 294, was a case in which it became necessary to determine the locality of certain personal assets. A testator domiciled in England by his will had appointed certain trustees, whom he called his "home trustees," to whom he bequeathed all his personal estate in the United Kingdom. He also appointed others, whom he called his "foreign trustees," to whom he bequeathed all his personal property in South Africa. At the time of his decease he owned a number of bonds payable to bearer of a waterworks company in South Africa, where the bonds were payable. He also owned a number of shares in mining companies in South Africa. These companies were constituted according to the laws of the Transvaal and Orange River Free States and had their head offices in South Africa, where the register of shareholders was kept and the directors met; but they had also offices in London, where a duplicate register was kept and where shares might be transferred. The testator's name was on the London register of the companies, and all his bonds and share certificates were at his banker's in London. On this state of facts, Farwell, J., held that the waterworks bonds passed to the "foreign trustees" and the shares to the "home trustees," the certificates being in England and the shares being also transferable there.

WILL—UNATTESTED ALTERATION—CONFIRMATION BY CODICIL—WILLS ACT 1837 (1 VICT. C. 26) S. 31—(R.S.O. C. 128, S. 23.)

In re Hay, Kerr v. Stinnea (1904) 1 Ch. 317, shews the necessity for attesting alteration in wills in the manner required by the Wills Act, s. 31 (R.S.O. c. 128, s. 23). In this case a testatrix had made a will on 1st February, 1901, bequeathing many legacies, including (a) £200 to C., (b) £500 to M., and (c) £3,000 to S. On 19th October, 1901, by her direction her servant struck out the three legacies. Subsequently, on 21st October, 1901, the testatrix executed a codicil referring to her will as of 1st February, 1901, and thereby revoked legacy (b), but did not refer to the other two

legacies, and concluded by ratifying and confirming the will in other respects; and it was held by Buckley, J., that only legacy (b) was revoked, and that no effect could be given to the unattested alterations.

RIVER—RIPARIAN PROPRIETOR—PRESUMPTION THAT RIPARIAN OWNER IS ENTITLED TO BED OF RIVER AND MEDIUM FILUM—ISLAND IN RIVER.

In *Great Tonington v. Stevens* (1904) 1 Ch. 347, the plaintiffs were grantees of land abutting on a river, but they had no express grant of the river. There was an island in the middle of the river opposite the property. The defendant took gravel from the bed of the river between the plaintiffs' land and the island, but nearer the island. The plaintiffs claimed that by presumption of law they were entitled to the bed of the river and medium filum and that such presumption extended to the whole river and entitled them to half of the island, and they sought to restrain the defendant from removing the gravel. Joyce, J., dismissed the action, holding that if the presumption applied, the medium filum aquæ ought to be drawn between the island and the plaintiffs' land.

CONTRACT—SALE TO WHOLESALE DEALER WITH CONDITIONS AS TO SALES BY RETAIL—"WHOLESALE DEALER TO BE DEEMED AGENT OF MANUFACTURER" PURCHASE WITH NOTICE OF CONTRACT OF VENDOR—CONDITION ATTACHED TO GOODS—INJUNCTION.

In *Taddy v. Sterious* (1904) 1 Ch. 354, the plaintiffs were manufacturers of tobacco which they sold in packets, subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing this proviso: "Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer the latter shall be deemed to be the agent of T. & Co." The plaintiffs sold to one Ritten, a wholesale dealer, who resold to the defendants Sterious & Co., who had notice of the conditions. The defendants nevertheless sold the goods at less than the minimum price mentioned in the notice, and the present action was brought to restrain them from so doing; but Eady, J., held that there was no contract between the defendants and the plaintiffs which the plaintiffs could enforce, and that conditions of the kind in question cannot be attached to goods so as to bind purchasers with notice. The stipulation that the wholesale dealer was to be deemed the plaintiffs' agent was nugatory in this case because Ritten sold the

goods as his own and not for the plaintiffs or as their agent; and in the opinion of Eady, J., it could only apply to cases where the wholesale dealer was in fact the plaintiff's agent.

COMPANY—WINDING UP—PROOF OF CLAIM AS UNSECURED CREDITOR—MISTAKE—SOLICITOR—LIEN.

In re Safety Explosives (1904) 1 Ch. 226. The solicitors of the company in liquidation, having a lien on the deeds and papers of the company, filed a claim, in which in forgetfulness of this lien, they stated they held no security. They subsequently applied to Buckley, J., to be allowed to withdraw the proof and file a new claim as secured creditors and valuing their security. Buckley, J., granted the application, but the Court of Appeal (Williams and Stirling, L.JJ.) held that it was not a case in which leave should have been granted but on different grounds. Williams, L.J., on the ground that the solicitors had not made out a case of inadvertence on their part, but even if they had they had lost their lien by parting with the deeds without calling the attention of the liquidator to their lien, and on the ground (with which Stirling, J., agreed) that the position of all parties, and especially that of the liquidator, had been altered since the proof was made.

STATUTE OF LIMITATIONS—PRINCIPAL AND AGENT—MONEYS REMITTED TO AGENT FOR SPECIAL PURPOSE AND NOT ACCOUNTED FOR—EXPRESS TRUST—ACTION FOR ACCOUNT—(R.S.O. C. 129, s. 32.)

North American Timber Co. v. Watkins (1904) 1 Ch. 242, was an action by principals against their agent for an account, in which the defendant pleaded the Statute of Limitations. The facts were, that in 1883 the plaintiffs remitted to the defendant in America moneys for the purpose of buying therewith prairie lands. Lands were bought and paid for out of the moneys. In 1901 the plaintiffs, for the first time, discovered that the defendant had charged the plaintiffs more for the lands than he had actually paid. Kekewich, J., held that the defendant was an express trustee of the money and the Statute of Limitations was no defence.

PRACTICE—PARTIES—BREACH OF TRUST—REPRESENTATIVES OF TRUST ESTATE.

In re Jordan, Hayward v. Hamilton (1904) 1 Ch. 260, was an action brought by a cestui que trust in respect of an alleged breach of the trusts of a marriage settlement. The original trustees of the settlement were Charles Jordan and Daniel Ludlow. Both

were dead. Jordan died in 1882 and Ludlow in 1886. There had been no new trustees appointed in their place: the action was against the executors of Jordan and the alleged breaches of trust were committed by both trustees. On a preliminary objection to the constitution of the suit, Byrne, J., held that the representatives of the last surviving trustee not being before the Court and no new trustees having been appointed, the trust estate was not represented, and no one having the legal title to the trust fund in question was before the Court. The case was, therefore, ordered to stand over to enable the representatives of the surviving trustee to be joined, or to enable new trustees to be appointed and added as defendants.

WILL—"TESTAMENTARY EXPENSES"—SETTLEMENT ESTATE DUTY.

In re King, Travers v. Kelly (1904) 1 Ch. 363, a testator directed his testamentary expenses to be paid out of his residuary estate. By statute a certain duty imposed in respect of property settled by will is payable by the executor. The question was, whether this duty was part of the "testamentary expenses." Eady, J., held that it was not, but was chargeable against the settled property.

COSTS—TAXATION—COSTS BEFORE ACTION—PREPARATION FOR DEFENCE BEFORE WRIT—RULE 1002 (29)—(ONT. RULE 1176).

In *Bright v. Sellar* (1904) 1 Ch. 369, the defendant being threatened with the present action for being party or privy to a fraud disclosed in a previous action to which he was not a party, in anticipation of the action and with a view to defending himself, procured a transcript of the speeches, evidence, and judgment in the previous action. The action having been dismissed, for want of prosecution, with costs it was held by Eady, J., that under Rule 1002 (29), (Ont. Rule 1176), the defendant was only entitled to the costs of so much of the transcript of the evidence and judgment as related to the present action.

then purchased a portion of them from McK., who did not pay the owner therefor and he brought an action of trover against E.

Held, affirming the judgment under appeal (36 N.B.R. 169), NESBITT and KILLAM, JJ., dissenting, that the owner having induced E. to believe that he could safely purchase from McK. could not afterwards deny the authority of the latter to sell.

Held, per NESBITT and KILLAM, JJ., that as there was no evidence that the owner knew the identity of the person making the inquiry by telephone, and nothing was said by the latter to indicate that he would not make further inquiry as to McK.'s authority to sell, there was no estoppel.

Held, per TASCHEREAU, C.J., that as the owner had given McK. an apparent authority to sell, and knew that he had agreed to buy for that purpose, a sale by him to a bona fide purchaser was valid. Appeal dismissed with costs.

Connell, K.C., and *Carvell*, for appellants. *Pugsley*, K.C., and *Gregory*, K.C., for respondent.

Qué.] CITY OF MONTREAL v. MONTREAL STREET RAILWAY CO. [March 25.
Operation of tramway—Municipal franchise—Construction of contract—Suburban lines—Percentages upon earnings outside city limits.

The city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city which extend into adjoining municipalities. The contract, dated 8th March, 1893, granted the franchise to the company for the period of thirty years from August 1, 1892. A clause in the contract provided that the company should pay to the city annually during the term of the franchise, "from Sept. 1, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on Sept. 1, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramway both inside and outside of the city limits;

Held, reversing the judgment appealed from, the CHIEF JUSTICE and KILLAM, J., dissenting, that the city was entitled to the specified percentages upon the gross earnings of the company arising from the operation of

tramway both within and outside of the city limits. Appeal allowed costs.

Atwater, K.C., and *Ethier*, K.C., for appellants. *Campbell*, K.C., respondents.

[C.] *POUPORE v. THE KING.* [March 30.

Contract—Construction—Public work—Finding of referees.

The specifications accompanying a call for tenders for the widening and deepening of a part of the St. Lawrence Canals which were a part of a contract subsequently entered into contained the following: "Parties entering for the works are requested to bear in mind that no part of the canal can be unwatered during the season of navigation, but that the canal may be taken out of the canal at the close of navigation when the work of widening and deepening the channel way to the full capacity can be done in the usual way be at once proceeded with; otherwise the work below the water-line must be done by sub-aqueous excavation." The contractor for the work claimed payment for extra work and increased cost on account of the Government refusing to unwater during the winter months. *Held*, that the contractor might be called upon to work under water during the time the canal was closed to navigation as well as when it was open and was not entitled to extra payment therefor especially as no work was made for unwatering.

The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered and spread in satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, the resident engineer returned 69,000 as falling under the above provision and the Government allowed 23,000 yards. The Exchequer Court Judge referred the matter to the registrar of the court and two engineers who reported that the amount allowed by the Crown was a sufficient allowance and their report was confirmed by the Court.

Held, that the Supreme Court would not overrate the judgment of the referees.

Other clauses of the contract required the contractors to make and submit their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works and every month until the claim was accepted or rejected. By the order-in-council referring the claims of the appellant to the Exchequer Court these clauses were waived "in so far as repeated submission of claims is required."

Held, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to it having arisen only from repeating it after the following certificate. Appeal dismissed costs.

Aylesworth, K.C., and *Christie*, for appellants. *Chrysler*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.]

[Jan. 25.

HOGG v. TOWNSHIP OF BROOKE.

Municipal corporations—Highway—Snow drifts—Temporary side track.

Plaintiff in travelling on a highway in the defendant corporation with a team of horses and waggon came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a frame fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard; but a thaw was in progress, which had commenced three days before. When those in the waggon sought to use the track the horses broke through, and the waggon was in danger of being upset. Plaintiff got out and in assisting the horses was injured by one of them.

Held, that under the circumstances it was the duty of the defendants to have opened up a way through the drifts sufficient to enable vehicles, such as the waggon in which the plaintiff was travelling, to have passed in safety along this highway; that the defendants had notice that the highway was out of repair and that the plaintiff was entitled to recover.

Judgment of a Divisional Court (MEREDITH, C.J., and MACMAHON, J.) reversing the judgment of FALCONBRIDGE, C.J., affirmed.

Shepley, K.C., and John Cowan, K.C., for the appeal. T. G. Meredith, K.C., contra.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.]

[March 4

ROGERS v. MARSHALL.

Chattel mortgage—Renewal—Statement of payments—Non-repetition of in subsequent statements.

In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor in which the validity of the renewals of a chattel mortgage was questioned on the ground that while the first renewal statement shewed all the payments made during the year and the total amount due; the subsequent renewal statements began with the total amount due in the preceding statement and did not repeat the payments there set out and credited.

Held, sufficient.

Judgment of the Second Division Court of the County of Lambton affirmed.

Reports and Notes

Christin v. Christin (1899), 1 O.L.R. (1897) 33 C. L. J. 695, overruled.

D. L. McCarthy, for the appeal.

rd, C.]

KIRCHOFFER v. IMPERIAL LOAN

idence—Discovery—Order of foreign & compelling attes

R. S. C. 1886, c. 140, extends to partner manager of a company (while the taking place), as such officer, is a son to be examined for discovery for t son had refused to attend and be exam a Manitoba court, made on an ex pa de on the present application to compe

A. Hoskin, K.C., for the motion. *B*

twright, Master in Chambers.]

TORNEY-GENERAL OF ONTARIO v. T CLUB.

idence—Production of membership ro of charter—Common &

In an action against the defendants i ng their premises as a common betting he Criminal Code, 1892, and for a reve *Held*, that the President of club v mbership roll of the club as it might inst him.

D'Ivry v. World Newspaper (1897) 1; 1 O.L.R. 659, followed.

Dewart, K.C., for the motion. *John redith*, C.J.C.P., *MacMahon*, J., *Teet*

REX v. FRAS

Certiorari—Insufficient return

In obedience to a writ of certiorari, i person to whom the writ was directed, y were in a loose condition, with no sy certiorari.

Held, to be a bad return which could *McCullough*, for the applicant. *Holn*

Province of Nova Scotia.

SUPREME COURT.

Full Court.] REG v. BIGELOW. [March 8.
*Liquor License Act of 1886—Sale in violation of provisions—Evidence—
 Conviction affirmed.*

Defendant's clerk received at Truro, N.S., an order addressed to Bigelow and Hood Ltd., Halifax, for one bottle of whisky. The order was sent to Halifax and returned the following day indorsed "Deliver this order from our Truro warehouse and charge, etc." Bigelow and Hood Ltd., rented from defendant, who was president of the Company, premises at Truro which they used as a bonded warehouse, but the evidence showed that the order in question was filled, not from the bonded warehouse, but from an open case in defendant's cellar, which was kept there for that purpose.

Held, that the evidence shewed a sale by defendant and that the appeal from the judgment of the County Court Judge for District No 4 affirming the conviction must be dismissed with costs.

Full Court.] CAPE BRETON ELECTRIC CO. v. SLAYTER. [March 8.
Electric Company—Obligation to supply meter reading to consumer—Burden to shew compliance—Offer to compromise—Not a waiver of right under statute—Payment of previous bills.

The Dominion Acts, 1894, c. 13, s. 13, sub. s. 2 enacts that "When ever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company seeking to recover for electric lighting and rent of meter.

Held. 1. The burden was upon plaintiff to shew compliance with the Act, and that non compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it.

2. An offer to compromise made on the part of defendant could not in any sense be treated as a waiver of the right conferred by the statute.

3. Per TOWNSHEND, J. The fact of previous bills having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid.

C. P. Fullerton, for appellant. *H. Mellish*, for respondent.

Full Court.] REX v. TOWN OF GLACE BAY. [March 8.
Arbitration—Arbitrator being interested as ratepayer—No disqualification
—Certiorari.

By the Acts of 1902, c. 80, the town of Glace Bay was empowered for the purpose of obtaining a water supply to enter upon any lands in the County of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town.

Held, dismissing with costs the appeal from the decision of TOWNSHEND, J., refusing a writ of certiorari.

1. That if the arbitrators were acting in a judicial capacity, c. 39 R.S. applied, and the fact of the arbitrator being a ratepayer afforded no valid objection to the award made by him.

2. That if the arbitrators were not acting in a judicial capacity a writ of certiorari would not lie to remove into this Court any award made by them.

H. McInnes, K.C., for appellant. *W. B. A. Ritchie, K.C.*, and *T. R. Robertson*, for respondent.

Full Court.] REX v. COOLEN. [March 8.
Criminal Code, ss. 262, 265, 713, 787—Information charging assault
causing bodily harm—Conviction for common assault—Held good—
Words "indictment" and "count."

Defendant was tried before the Stipendiary Magistrate of the City of Halifax on an information charging him with committing an assault upon J. F., causing bodily harm. The accused having consented to be tried summarily in accordance with s. 787 of the Code was tried and convicted of a common assault only.

Held, 1. Sec. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262 as the latter section includes common assault.

2. The contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 sub-sec. (b) of the Code where it is provided that the expressions "indictment" and "count" respectively include information and presentment as well as indictment and also any plea, replication or other pleading and any record.

3. Independently of the statute the conviction was good.

See *Queen v. Oliver*, 30 L.J.M.C. 12, and *The Queen v. Taylor*, L.R. 1 C.C.R. 194.

Leahy, for appellant. *O'Hearn*, contra.

Full Court.]

REX v. GAUL.

[March 8.

Criminal Code, s. 55—Punishment of child by teacher.

The Criminal Code, s. 55, authorizes parents, persons in the place of parent, school masters, etc., to use force by way of correction towards any child, etc., under his care "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." Defendant, a teacher in one of the public schools of the city, was charged before the Stipendiary Magistrate of the city of Halifax for assaulting, beating and ill using J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on the part of defendant or of permanent injury to the child.

Held, 1. The only question properly before the Stipendiary Magistrate was whether the punishment was reasonable under the circumstances, or, in other words, whether there was excess.

2. There is no warrant in the Code for the test applied in the American case of *State v. Pendergrass*, 31 Am. Dec. 365, and adopted by the Stipendiary Magistrate that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child.

W. A. Henry and *R. T. Murray*, for appeal. *H. McInnes*, K. C., contra.

Full Court.]

REX v. BIGELOW.

[March 8.

Liquor License Act of 1886—Conviction as for third offence—Use of previous convictions to establish.

Previous convictions may be used as evidence upon which to base a conviction for a third offence against the provisions of the Liquor License Act as often as such an offence is charged and proved.

It is not now necessary under the statute (s. 131) to ask the defendant whether he has been previously convicted unless he is present in person.

Where at the conclusion of each of several cases tried before him the magistrate decided to convict, but at the instance of defendant's counsel retrained from imposing sentence and drawing up the formal conviction until the County Court Judge should have decided a question raised on the trial as to the use of previous convictions.

Held, dismissing defendant's motion to quash and ordering a writ of procedendo, that the magistrate was not precluded from proceeding with the convictions at a later stage.

J. A. Chisholm and *H. V. Bigelow*, for motion to quash. *S. D. McLellan*, contra.

Ritchie, J.]

REX v. TURPIN.

[March 21.

Criminal Code, ss. 241, 265, 668, 760—Indictment for wounding with intent and for common assault—Motion to quash refused—Peremptory challenges.

The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts, charging him (1) for that he in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, with intent to do grievous bodily harm to one Thomas J. Weatherdon, did unlawfully wound the said Thomas J. Weatherdon, and (2) for that he did in the city of Halifax on the 13th day of November, in the year of our Lord one thousand nine hundred and three, unlawfully assault one Thomas J. Weatherdon. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it on the ground that the Clerk of the Crown had not sent the deposition taken on the prisoner's preliminary examination, before the grand jury of the County of Halifax, as required by s. 760 of the Criminal Code. When the jury was being sworn the prisoner claimed the right to sixteen peremptory challenges on the ground that these counts before the Code would have been for a felony and misdemeanor respectively, and as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was under the above section, being tried on two indictments.

Held, 1. The indictment was properly found.

2. The prisoner was only entitled under s. 668 of the Criminal Code at twelve peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence if the evidence warranted it.

The prisoner was then tried and acquitted on both counts in the indictment.

M. N. Doyle and J. A. Knight, for the Crown. *John J. Power*, for prisoner.

COUNTY COURT, DISTRICT No. 1.

Wallace, Co. J.]

RE MYERS v. MURRANS.

[March 24.

Landlord and tenant—Overholding Tenant's Act, R.S. 1900, c. 174—Demand for possession held bad for uncertainty—Evidence of overholding—Writ of possession refused.

An application was made by the landlord for a writ of possession against the tenant under the Overholding Tenant's Act, R.S. 1900, c. 174,

based on the following demand for possession, which was served on the tenant on March 9, 1904 :

Halifax, N.S., March 9, 1903.

Lawrence D. Murrans, Esq.,
Gottingen Street, City,

Dear Sir,—

Your lease to the premises, No. 94 Gottingen St., Halifax, N.S., expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith.

Yours truly, J. E. MYERS.

The tenant had held under a lease by deed, dated in 1901 for a term of three years, but owing to erasures and alterations in the indenture there was some doubt as to whether or not the tenancy terminated on March 1, 1904, or May 1, 1904. Before service of the above demand the landlord had on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by the lease) on May 1, 1904. On the hearing it was contended that no evidence had been given that the tenant had refused after the service on March 9th, 1904, of the above demand in writing to go out of possession.

Held, that the written demand for possession was bad for uncertainty and under all the circumstances, following *Re Magann v. Bonner*, 28 O.R. 37 and *Re Snure v. Davis*, 4 O.L.R., 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused.

O'Mullin and *W. S. Gray*, for landlord. *John J. Power*, for tenant.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

EX PARTE VANCINI.

[Feb. 5.]

*Jurisdiction of police and stipendiary magistrates in cities and towns—
Made effective by Provincial Act of 1889.*

The Legislature of New Brunswick in 1889 passed the following Act with reference to the jurisdiction of police and stipendiary magistrates in criminal cases: "Each and every stipendiary or police magistrate is hereby created, declared and constituted a court, and is hereby declared to have always heretofore been constituted a court, with all the powers and jurisdictions which any Act of the Parliament of Canada has conferred or may confer, or which any Act of the Parliament of Canada purports to confer upon any stipendiary or police magistrate within the province." In 1900, s. 785 of the Criminal Code, which empowers or purports to empower any police or stipendiary magistrate in Ontario to try, with the consent of the accused, any person charged in the province of Ontario with any offence "for which he may be tried at a Court of General Sessions of the Peace," by adding thereto the following sub-section: "This section

that such powers under The Municipal Act and otherwise should be vested in a receiver to be appointed by the Lieutenant-Governor in Council, and that the receiver should have power to recommend the passage of such by-laws as might be passed by the Mayor and Council under said Acts, the same to be submitted to the Lieutenant-Governor in Council. By 63 & 64 Vict., c. 32, it was provided that the Lieutenant-Governor in Council might by order-in-council appoint or provide for the election of three persons to act as an advisory board for the town and prescribe the duties and powers of such board. Pursuant to this statute an order-in-council was passed appointing the members of such advisory board and defining their duties, one of which was to perform in an executive capacity all the duties vested in municipal councils under the provisions of the Municipal Act. They were also required to meet at least once a month for the transaction and ratification of all business affecting the town and to advise and assist the receiver and authorize and supervise the expenditure of the moneys of the town. The defendant was the receiver of the town appointed under c. 10 of 57 Vict., and acted as such until he was dismissed in February, 1901, when W. W. Unsworth was appointed receiver. This action was brought in the name of the town and W. W. Unsworth, its receiver, for an account of moneys alleged to have been received by the defendant while he was receiver of the town and not accounted for or paid over. On his examination for discovery the plaintiff, Unsworth, admitted that he had not authorized the bringing of the action, and the defendant then moved before the referee for the dismissal of the action or for a stay of proceedings on the ground that the action had been commenced without the authority of the plaintiff or either of them. On the return of the motion a retainer was produced, signed by Unsworth in the name of the town and for himself as receiver, and sealed with the corporate seal, authorizing the solicitors to prosecute the action, and ratifying, confirming and adopting it, and all things done and proceedings taken therein, and acknowledging that it had been brought with the full knowledge, sanction and approval of the said town and of himself as such receiver. The referee held that this did not shew sufficient authority to sue in the name of the town and ordered that the name of the town be struck out of the action, but refused to dismiss the action or stay the proceedings as authority from Unsworth was now shewn.

Both sides then appealed to a Judge in Chambers, and when the appeals came on to be heard the plaintiff's solicitors produced a resolution of the advisory board passed after the date of the referee's order and containing a retainer and authorization of the suit in the same terms as that formerly signed by Unsworth, and sealed with the seal of the town. By consent a pro forma order was made dismissing both appeals so that the whole matter might be dealt with by the full court.

Held, that a municipal corporation may authorize the commencement of an action by resolution under the corporate seal and that a formal by-law is not necessary: *Town of Barrie v. Weaymouth*, 15 P.R. 95; *Barrie*

Public School Board v. Town of Barrie, 19 P.R. 33, and *Brooks v. Mayor of Torquay* (1902) 1 K.B. 601, followed.

Quære, whether a defendant has any locus standi, under the present practice, to ask for the dismissal of an action on the ground that it has been brought without the authority of the plaintiff.

Plaintiff's appeal allowed and defendant's appeal dismissed. Costs of motion down to the appeal to the full court to be costs to the defendant in any event, as the authority for bringing the suit was not furnished after the motion was made. No costs of the appeals to the full court. *Phippen and Minty*, for plaintiffs. *Munson*, K.C., and *Laird*, for defendant.

Court.] STARK v. SCHUSTER. [March 5.

Members of Provincial Legislature—B.N.A. Act, 1867, ss. 91 and 92—Shops Regulation Act, R.S.M., 1902, c. 156—Municipal Act, R.S.M., 1902, c. 116, s. 527—Winnipeg Charter, 1902, c. 77, s. 931—Ultra vires—By-law requiring closing of shops at certain hours—Unreasonableness and uncertainty as grounds of objection to by-law.

Rule nisi to quash the conviction of defendant for breach of a by-law of the City of Winnipeg requiring all shops with certain exceptions to be closed after six o'clock p.m. except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, 1891, M. (1891) c. 140, which is now c. 156 of the R.S.M., 1902, which came into force March 6, 1903. In March, 1902, the Winnipeg charter, then in force and the new Municipal Act, c. 116 of the R.S.M., 1902, contained a clause (22) providing that the City of Winnipeg is not included in the expression "municipality" where the same occurs in the Act. Section 15 of "The Shops Regulation Act," provides that any by-law made by a municipal council under the Act shall be deemed to have been made under and by authority of the Municipal Act and as if the preceding provisions of the Act had formed part of the Municipal Act, and that the preceding sections of the Act and the Municipal Act should be read and construed together as if forming one Act. It was contended on behalf of defendant that the present Shops Regulation Act does not apply to the City of Winnipeg by reason of its being incorporated as above mentioned in the Municipal Act, R.S.M., 1902, c. 116, which Act is expressly excluded from operation in Winnipeg.

Held, 1. Without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg Charter and s. 527 of the Municipal Act is to retain and keep in force the by-laws of the city theretofore lawfully passed, and that the by-law in question was in full force and effect.

2. As the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its pro-

visions could not be held to be unreasonable, uncertain or oppressive, so as to render it invalid or unenforceable. *Brydone v. Union Colliery Co.* (1899) A. C. 580; *Re Boylan*, 15 O.R. 13, and *Simmons v. Mallings*, 13 T.L.R., 447, followed.

3. The provisions of the Shops Regulation Act are intra vires of the Provincial Legislature under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the Province and not interfering to a material extent with the Regulation of Trade and Commerce assigned to the Dominion Parliament by s. 91.

The Court considered that the legislation in question in *Attorney-General of Ontario v. Attorney-General of Canada*, (1896) A.C. 348, and *Attorney-General of Manitoba v. Manitoba License Holders' Association*, (1902) A.C. 77, and which was held to be intra vires of the Province in each case, interfered with Trade and Commerce to a greater extent than the Shops Regulation Act could do.

Bonnar and Potts, for defendant. *I. Campbell*, K.C., and *A. J. Andrews*, for the City of Winnipeg.

Full Court.]

AIKINS v. ALLEN.

[March 5.

Principal and agent—Commission on sale of land.

About Dec., 1902, Pepler, a member of plaintiffs' firm, who are real estate agents, called on defendant and asked him if his house was for sale. Defendant replied that it was and that the price was \$14,000. Nothing was said about a commission. In February, 1903, Pepler went again to defendant and was told that the house was still for sale, and again nothing was said about a commission. He then introduced a purchaser who, by arrangement with defendant, was shown over the property. The purchaser then authorized Pepler to make an offer of \$12,500 for the property. The latter called on defendant and communicated this offer to him, when defendant said he would not take any less than \$14,000 and that he wanted that net. Pepler objected to this, saying that he had understood that the price would cover the usual agent's commission, but said he would ascertain whether the purchaser would pay the extra amount asked. He did so, and the purchaser replied that he would let him know in a few days. Shortly afterwards, the purchaser, without any further communications between him and plaintiffs, entered into negotiations with defendant direct and bought the property for \$14,000.

Held, Perdue, J., dissenting, that, under the circumstances, plaintiffs were entitled on a quantum meruit to the full amount of the usual commission on the purchase money. *Wolf v. Tail*, 4 M.R. 59; *Wilkinson v. Martin*, 8 C. & P. 1, and *Marson v. Burnside*, 31 O.R. 438, followed.

The mere fact that the agent has introduced the purchaser to the seller will not be sufficient to entitle him to recover a commission on the sale; but, if it appears that such introduction was the foundation on which

Prior to the coming into force of the Bills of Exchange Act, 1890, c. 33, it was well settled law that if the signature of the matter of a note was obtained upon the representation that it was a completely different document he was signing, and if he signed it without knowing it was a note he was signing, and under the belief that he was signing something else, and if he was not guilty of any negligence in so signing X, he would not be liable even to a holder of the note who acquired it during its currency for value without notice of the fraud.

Sections 29, 38 of that Act have made no change in the law, as is shewn by the case of *Lewis v. Clay*, supra, decided in 1897, since the coming into force of the Imperial Bills of Exchange Act, which contains exactly the same provisions upon the subject as ss. 29, 38 of our Act. Action dismissed with costs.

Haggart, K.C., for plaintiffs. *Rothwell and Johnson*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.]

REX v. TANGHE.

[Jan. 5.

Certiorari—Rule nisi to quash conviction—Motion for—Jurisdiction of single judge to hear—Practice.

Motion for a rule nisi to quash a conviction.

Held, that the full court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge.

C. C. McCaul, K.C., for motion.

Full Court] *TRADERS' NATIONAL BANK OF SPOKANE v. INGRAM*. [Jan. 5.

Appeal—Notice of—Court at which appeal should be brought on—Supreme Court Act, ss. 76 and 79.

Motion to quash an appeal on the ground that it was not brought in time. A final judgment was pronounced and entered on 27th February; notice of appeal to the January sitting of the full court was given on 24th October. A sitting of the full court commenced according to the statute on 3rd November:

Held, per IRVING and MARTIN, JJ., HUNTER, C.J., dissenting, that the appeal was brought in time.

W. H. P. Clement, for the motion. *S. S. Taylor*, K.C., contra.

Book Reviews.

A Treatise on International Law. By WILLIAM EDWARD HALL, M.A.
Fifth edition. Edited by J. B. Atlay, M.A., barrister-at-law.
Oxford: At the Clarendon Press. London: Henry Frowde, Oxford
University Press Warehouse, Amen Corner; and Stevens & Sons,
Limited, 119 and 120 Chancery Lane. 1904.

Mr. Hall, the learned author of this standard work, having died in 1894, after completing the fourth edition, Mr. Atlay was intrusted with the preparation of the fifth. Since the last edition many important events have taken place, such as the Venezuela boundary dispute; the Hague conference; various incidents in the Spanish-American war, and the war in South Africa; events in Japan and China, etc., etc., which demands notice at the hands of the editor. These have been touched upon in the present addition, and add largely to the value of the work. The law governing States in the relation of neutrality is especially interesting at the present time, as well as the author's opinion on the questions likely to arise or which have arisen in this connection: for example, the use of neutral territory by a belligerent as a basis of operations, the asylum which may be given to the land or naval forces of a belligerent, the definition of contraband of war, and the general position of neutral persons and property within belligerent jurisdiction, etc. It is quite unnecessary to do more than call attention to these distinctive features of the present edition, as the work is so well known, and is accepted everywhere as an authority.

There will doubtless be a very large sale of so interesting a book at the present time. Its value is largely increased by an excellent index. The work of the publisher and the printer is of course of the best.

Stone's Justices' Manual, being the Yearly Justices' Practice for 1904. 36th ed. By J. R. ROBERTS, Solicitor, etc. London: Shaw & Sons, 7 & 8 Fetter Lane; Butterworth & Co., 12 Bell Yard, 1904.

This well known and most concise compendium is of course a necessity in the British Isles, as well as useful in this country to all concerned in that branch of the administration of justice. It is interesting to notice the gradual development of criminal law in reference both to the classes of persons and the subjects affected by legislation from time to time. This last edition, for example, takes up and deals with the Employment of Children Act, the Motor Car Act and the Poor Prisoners Defence Act.

Flotsam and Jetsam.

The English law periodicals record the unexpected death of Mr. Justice Byrne, which, it is said, will cause a great loss to the profession and the public. He commenced his career as a junior of the Chancery bar, became afterwards a leader in the Court of Mr. Justice Chitty, and was subsequently appointed a judge of the Chancery Division. It is said, that a judge of his ability and learning, would in due course, have been raised to the Court of Appeal. He had a pleasing personality, an irreproachable character and unfailing tact and courtesy, and to this was added, the more solid attributes of an extensive knowledge of law.

The late Lord Coleridge was once speaking in the House of Commons in support of Womens' Rights. One of his main arguments was that there was no essential difference between the masculine and feminine intellect. For example he said: "Qualities of what is called the judicial genius sensibility, quickness, and delicacy—are peculiarly feminine." In reply Sergeant Dowse said, "The argument of the honorable and learned member compendiously stated amounts to this: 'Because some judges are old women, therefor, all old women are fit to be judges.'"

We are rather inclined to sympathize with that Southern judge whose decisions were frequently reversed by the Supreme Court. Needless to say he possessed no exalted opinion of the latter. One day a negro was brought before him, charged with the usual offence and being found guilty was duly sentenced. Defendant's counsel gave immediate notice of appeal. That evening, however, a mob broke into the jail and the morning sun saw the late prisoner dangling from a telegraph pole. The sight greeted his Honor as he was turning into the Courthouse square, and he gazed long and placidly. "Well, judge," asked a friend, "what do you think of it?" "What do I think?" he repeated, as a quiet smile of satisfaction spread over his face; "I think, sir, that there's one of my judgments that that — Supreme Court won't reverse."—*American Lawyer*.

RETORTS COURTEOUS.—At a dinner party the other evening, says the Washington Star, a well known minister sat opposite one of the leading legal lights of Washington. During a lull which often occurs on such occasions, the minister casually asked the jurist what he thought would be the outcome of Mayor Harrison's arrest in Chicago in connection with the Iroquois Theatre disaster.

"I can't express an opinion without a retainer," promptly replied the lawyer.

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Firm name.—As between a surviving partner and the executor of the deceased one, the firm name is held, in *Slater v. Slater* (N. Y.) 61 L.R.A. 796, to be an asset of partnership which the executor has a right to have sold for the settlement of the partnership affairs.

Negligence.—An aggravation of personal injuries caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance is held, in *Texas & P. R. Co. v. White* (C. C. App. 5th C.) 62 L.R.A. 90, not to be chargeable against the party by whose negligence the original injury was received.

Negligence.—The owner of a structure to be used as a toboggan slide at a bathing resort is held, in *Barret v. Lake Ontario Beach Improv. Co.* (N. Y.) 61 L.R.A. 829, to be liable for resulting injuries in case a person attempting to use it falls from it by reason of insufficiency of the railing, although it is in possession of a tenant.

Married Women.—The right of a woman to enter into a partnership agreement with her husband, under statutory authority to acquire, own, and dispose of property to the same extent as her husband may do, and to make contracts and incur liabilities to the same extent as if unmarried, is sustained, in *Hoaglin v. Henderson* (Iowa) 61 L.R.A. 756.

Nuisance.—Temporary occupation of a highway with rails, by a road company, for its convenience while elevating its roadbed to a higher grade crossing over a highway, is held, in *McKeon v. New York, N. H. & H. R. Co.* (Conn.) 61 L.R.A. 730, to entitle the abutting owner whose access to and from his property is thereby destroyed, to compel

Railways.—One who boards a train without a ticket at a ticket office is not open for the sale of tickets as required by statute in *Monnier v. New York C. & H. R. R. Co.* (N. Y.) 62 L.R.A. , no right to refuse to pay the extra fare required of passenger tickets, and resist ejection on tender of the price of the ticket, required to pay the additional fare, and resort to his legal remedy and the statutory penalty for failure to have the office open.

Municipal Law.—A municipal corporation is held, in *Ge Com.* (Ky.) 61 L.R.A. 673, not to be subject to indictment for compelling the abatement of a nuisance to which it has contributed of the emptying of filth into an open drain on private property limits. An extensive note to this case collates all the other authority and liability of municipality with respect to drainage. As providing for the punishment of persons loitering about the barrooms in idleness, without habitation or visible means of support is held, in *Re Stegenga* (Mich.) 61 L.R.A. 763, to be within the municipal corporation.

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LAW AND LORE.

The publication of "The Pathways to Reality," by the Right Honourable R. B. Haldane, K.C., which comprises a series of Gifford lectures, serves to remind us that the English Bar to-day is not forsworn its learned traditions. Mr. Haldane's name is perhaps more widely known to us by reason of his professional connection with many important Canadian cases before the Judicial Committee of the Privy Council; but he holds a high place in the estimation of the savants and literati of his native land, and whilst he can find time for the faithful performance of his duties as a member of Parliament. To be admitted to the honour of delivering a series of Gifford lectures before the University of Edinburgh is a certificate of intellectual fitness that few are privileged to possess whose energies are wholly devoted to scholarship; and for the choice to fall upon one who plays a busy part both at the Bar and in Parliament is a distinction indeed. To give some idea of Mr. Haldane's contributions to philosophy and literature we may mention, in addition to the work referred to, his "Essays in Philosophical Criticism," "Life of Adam Smith," his translation (in collaboration with Mr. Kemp) of Schopenhauer's "World as Will and Idea," and "Education and Empire," published in 1902. This is a catalogue fit to be the product of a life-time, but Mr. Haldane is a young man yet with many years of usefulness before him in the ordinary course of nature.

It is just such a case as Mr. Haldane's that emphasizes the difference between the English and Canadian points of view with regard to the expediency of limiting the lawyer's intellectual activities to the domain of the law. In England it has never been a deterrent to professional success to be suspected of literary leanings, or to be known to devote a portion of the day to walking the "studious cloisters" outside the jurisdiction of Astræa. In Canada, and to a certain extent in the United States, there is an unreasonable prejudice against the "literary lawyer;" and clients shy at the door of him who "turns a madrigal for half a crown," but are in no

wise fearful of trusting their legal fortunes to one who flirts with politics—an enterprise which kills more good lawyers than anything else we wot of. We have never seen the case for literary diversion as against political dalliance on the part of lawyers better put than in the following extract: "One can choose his opportunities to study and write when other engagements do not press. But he who is influential in political life has no moment to call his own. He must make and keep regular appointments, no matter how much his business is interfered with; and besides this, he commonly spends many valuable hours in private consultations, in countermining and petty diplomacy. The lawyer who takes literature instead of politics as his "led horse," has much more command of his time, and unquestionably much less exhaustive drain upon his vital energy."

Bolingbroke in his day found cause to chide the "mere lawyer," and counselled those who would devote themselves to the province of jurisprudence to approach it by the "vantage-grounds" of metaphysical and historical knowledge. When we cast our eyes over the illustrious roll of savants and authors who have adorned the English Bench and Bar from Bacon to Mr. Haldane we are ashamed of the provincialism that hedges about the ambitions of the profession in our own country, and are constrained to urge a prompt widening of our horizon in this respect. "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy."

SURVIVAL OF THE UNFIT.

The same subject has cropped up for discussion, at the same time, and without any apparent connection, both in England in the *Law Times* and in the United States in the *Law Notes*. One article is styled "The Problem of the Degenerates" and the other, "Penal Legislation and Crime." The saying that "great minds jump together" is further applicable as there is a similarity of treatment by both writers.

The problem for solution is the anthithesis of the proposition as to "the survival of the fittest". The bold proposal suggested in the *Law Times* by Dr. Rentoul, an eminent English Physician would be to cut the gordian knot (possibly more senses than one)

publishes a pamphlet advocating the sterilization of certain mental and physical degenerates. This pamphlet contains a can-statement of a condition of affairs, physical and mental, which alleges is rapidly becoming worse. He tells us that "we are engaged in the apparently pleasant manufacture of lunatics and degenerates of this class. Our asylums and like places are practically factories for degenerates; and he asks, "How long does the public propose that these things shall go on?"

Figures are given to show that in England, in 1901, one in every 301 is an officially notified lunatic, in Scotland one in every 247, in Ireland, one in every 206. Our statistics show for Canada, are large. There are of course a large number of lunatics and degenerates who do not appear in any returns. Statistics also show that many lunatics and other degenerates who were discharged from certain asylums in England from 1895 to 1903 as cured, only half of them were returned again. Obviously these cases were not cured at all, but all the same they had a year or so in which to enter into or resume the relations of marriage. "It would be as dangerous," observes Dr. Rentoul, "to send out among the public, persons cured of small pox or plague, without first having disinfected their clothes." It was stated in the House of Lords, in proof of the degeneracy of the British population, that fully 10 per cent. of the candidates for the navy are rejected for physical causes. As to our charitable institutions it is asserted that many of them are working indirectly for the survival of the fittest; and the trouble is that this class reproduce themselves as vigorously as do the healthy ones.

The subject is undoubtedly a difficult as well as a delicate one. A remedy has been suggested which has already found its way into the systems of law, and it is that no one should be allowed to marry without having first obtained leave so to do from some governmental board, after a rigid examination. This, however, manifestly would only be a partial remedy.

The *Law Notes* argues it out in this way: The government spends large sums in investigating the cause and cure of diseases among animals and plants and how to produce the best results, but has spent nothing in this line as regards the securing a suitable species of the human being. The writer then continues: We have often tried to consider what would be the result if for

a few years we should apply the same principles to raising the next generation of citizens that we apply to raising the next crop of wheat or our next crop of hogs. A farmer who raises stock for money there is in it would be condemned by his neighbors 'cracked' if he voluntarily permitted his runts to reproduce themselves, or refused to apply to his business all he knew or could learn about artificial selection of the best. But we as a people go on year after year allowing our physical and mental and moral runts to reproduce themselves ad libitum and then wonder why crime does not decrease faster. In government we seem to imagine that the criminal has as much right to reproduce his kind as has the virtuous, and that to restrain him would infringe his rights. This is true only if we admit that the rights of the individual outweigh those of society, and that the rights of crime are equal to the rights of decency and virtue. The runt as progenitor of a species may be eliminated by simply isolating him and not permitting him to multiply and replenish the earth. We may treat him with kindness, as we are responsible for his existence, but we may also say, in self-defence, we do not want and will not have any more of your kind. Let some wise legislator devise some way of applying to human beings the rational principles that are already followed by the departments of biology and animal life and breed our criminals out instead of continuing to breed them into our national and social life."

Something more practical, however, than this is wanted; and Dr. Rentoul is on hand with something very definite in the way of a remedy. The details of it, however, are more fit for discussion in a medical than in a legal journal. His remedy would not interfere with marriage, but would render marriage unproductive amongst the degenerates in a physical sense. He would induce sterilization in the lunatic, the confirmed inebriate, the epileptic and others of that class, and would not omit those who are confirmed tramps and vagrants and known to be such to workhouse officials and to the police.

This is rather a startling proposition but the statements regarding degeneracy of the race are equally startling. If we read history aright, the healthiest, the cleanest and most vigorous nation the world has ever seen were the people that crossed the Jordan under Joshua, after having been subjected for nearly half a cent

victions for what then bore the distinguishing titles of Grand and Petit larceny. Later, by 16 Geo. III, c. 6, when transportation beyond the seas was decreed for certain felonies, condemnation to hard labor might be superimposed. After the passage of 19 Geo. III, c. 74, explorers were driven back, for the law on the subject, until 3 Geo. IV., c. 114, upon the statute of Ann, before mentioned. The provisions of 7 & 8 Geo. IV., c. 28, extended the infliction of hard labor to all offences within the category of felonies. It will be seen, therefore, that when, in 1791, the common law, as then existing, was transplanted to this country, hard labor was sanctioned as an auxiliary punishment in larceny only. We are not concerned in these accusations with anything prescribed by 7 & 8 Geo. IV., c. 28, because conspiracy was never counted a felony. Moreover, 14 & 15 Vict. c. 100, s. 29, demonstrates that conspiracies did not come within the prior legislation appointing hard labor, by enacting that "any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert or defeat the course of justice," was to carry with it this aggravation of the sentence.

Hodge v. The Queen, 9 App. Cas 117, determined of course that the term "imprisonment" in sec. 92 of B.N.A. Act (conferring power on a legislative body) must be construed as including hard labor; still, the view expressed by the Court in *Reg. v. Frawley*, 46 Q.B. 153, has a bearing on this discussion. Hagarty, C. J., in delivering judgment, says, "We are satisfied that if the law merely directs imprisonment as the punishment of an offence, no Court of Justice, can, in the absence of any general discretionary power to that effect, award hard labor in addition. We are of opinion that it is an additional substantive punishment, varying only in degree from the infliction of whipping, the treadmill, solitary confinement, etc."

The Encyclopædia of English Law (tit. Conspiracy) points out that other conspiracies laid in our time, as misdemeanors at common law, would not justify the imposition of the greater burden. The advent of hard labor in England—synchronous with the formation of Houses of Correction—as part of a felon's expiation was delayed for the time it was by reason of the vogue which hanging so long enjoyed.

J. B. MACKENZIE.

EDITOR

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TRUSTS—DEVISEES IN POSSESSIONS ACT, 187

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DEVISE TO CHILDREN—W

Alpin v. Sto

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Ellen or her children. Ellen's husband, unfortunately for her, attested the will, the disposition in her favour was, therefore, void, and it was contended that the disposition in favour of the children took effect; but Eady, J., refused to give effect to that contention because it was clear that, apart from s. 15, the devise must be construed as a devise to Ellen, if living at the widow's death, and if not, then to her children. But, as he pointed out, the gift to the children was only to take effect if Ellen was not living at the death of the tenant for life, an event which had not happened, consequently there was really no devise to them.

EASEMENT—PRESCRIPTION—CLAIM OF RIGHT OF WAY BY PRESCRIPTION BY ONE TENANT AGAINST ANOTHER HOLDING UNDER SAME LANDLORD—UNITY OF OWNERSHIP—DOMINANT AND SERVIENT TENEMENTS—FORTY YEARS USER BY LESSEE—PRESCRIPTION ACT, 1832 (2 & 3 Wm. 4, c. 71), ss. 2, 8 —(R.S.O. c. 133, ss. 35, 41).

Kilgour v. Gaddes (1904) 1 K.B. 457, was an action for trespass in which the plaintiff also claimed an injunction to restrain further trespasses by the defendant. The plaintiffs were tenants of adjoining tenements held under the same landlord. For forty years during the defendant's term he had been accustomed without objection to enter on the plaintiff's premises and make use of a pump thereon, and it was to prevent his further doing so that the action was brought. The defendant claimed that he had by his forty years' user acquired a prescriptive right to an easement, relying on the Prescription Act, 1832, s. 2, (R.S.O. c. 133, s. 35). Walton, J., who tried the action, upheld his contention, but the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) reversed his decision, holding that one tenant cannot acquire a title by prescription against another tenant holding under the same landlord; because the tenant's possession is the possession of the landlord, and there is consequently a unity of ownership preventing the acquisition of any prescriptive rights by either tenant against the other. The dictum of Chitty, J., in *Harris v. De Pinna*, 33 Ch. D. 238, to the contrary, was held not to be well founded.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—MONEY PAID UNDER CONTRACT—FAILURE OF CONSIDERATION—RIGHT TO PAYMENT ACCRUING BEFORE PERFORMANCE OF CONTRACT IMPOSSIBLE.

Chandler v. Webster (1904) 1 K.B. 493, was another case arising from the postponement of the Coronation. In this case the defendant agreed to let the plaintiff a room for the purpose of viewing

procession, on June 26, 1902, for £141 15s. By the terms of contract the price was to be paid before the time fixed for the procession and before it was known that it would not take place. The plaintiff had paid £100 on account, which he now sought to recover as on a total failure of consideration, and the defendant counterclaimed for the balance of £41 15s. remaining unpaid. Lord Wright, J., held that the plaintiff was not entitled to recover the £100 paid, and that the defendant was not entitled to the £41 15s. because, in the view he took of the contract, that was not payable until after the procession had taken place. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) affirmed his judgment as to the £100, but took a different view of the contract as to the payment of the £41 15s., which they held was payable prior to the date fixed for the procession and before it had become impossible.

INSURANCE—INSURABLE INTEREST—POLICY ON LIFE OF ANOTHER—WAGERING POLICY—14 GEO. 3, C. 48, SS. 1, 2—(R.S.O. C. 339, SS. 1, 2)—RECOVERY OF PREMIUMS PAID ON VOID POLICY—IN PARI DELICTO.

In *Harse v. Pearl Life Assurance Co.* (1904) 1 K.B. 558, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have reversed the judgment of the Divisional Court (1903) 2 K.B. (noted ante vol. 39, p. 613). The plaintiff had effected an insurance on the life of his mother, relying upon a representation by the agent of the insurance company that the policy would be valid. Having subsequently discovered that the policy was void under 14 Geo. 3, c. 48, s. 1, (R.S.O. c. 339, s. 2), he sued for the recovery of the premiums. The Divisional Court held him entitled to succeed, being of opinion that the plaintiff was entitled to assume that the defendants' agent was familiar with insurance law and therefore the parties were not in pari delicto. The Court of Appeal, on the other hand, came to the conclusion that as the representation of the agent was innocently made, the parties were not in pari delicto, and therefore the plaintiff could not recover.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—PAYMENT ON ACCOUNT OF CONTRACT—EXPRESS PROVISION FOR EVENT OF PERFORMANCE OF CONTRACT BECOMING IMPOSSIBLE.

In *Elliott v. Crutchley* (1904) 1 K.B. 565, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the judgment of Ridley, J. (1903) 2 K.B. 476 (noted ante vol. 39, p. 746).

This was another of the actions arising out of the postponement of the Coronation. In this case, it may be remembered, a ship was hired to convey passengers to see the intended naval review. By the terms of the contract £300 was to be paid on account of refreshments on a day prior to that fixed for the review, and the contract expressly provided that in the event of the cancellation of the review before any expense was incurred there should be no liability on the part of the defendants. The plaintiff expended a small sum for extra knives and forks, but nothing for refreshments. A cheque for £300 was sent in accordance with the contract, but, before its presentation, payment was stopped. The plaintiff sued on the cheque, but the Court of Appeal agreed with Ridley, J., that he could not recover, as, on a true construction of the contract, in the event of the cancellation of the review the defendants were only liable to reimburse the plaintiff any expense then incurred by him.

CONFLICT OF LAWS—CONTRACT OBTAINED ABROAD BY DURESS—CONTRACT VALID WHERE MADE.

Kaufman v. Gerson (1904) 1 K.B. 591, was an action tried by Wright, J. The action was brought on agreement to pay a certain sum of money, and the defendant set up that it had been obtained by duress and threat of criminal prosecution of the defendant's husband. It was shewn that the agreement sued on was made in France, and that according to the laws of France it was legal and binding, notwithstanding the duress. Wright, J., gave judgment for the plaintiff (1903) 2 K.B. 114 (noted ante vol. 39, p. 614). We are not surprised to see that the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have come to a different conclusion. The Master of the Rolls adopts the view of Story, that where an English Court is asked to enforce a contract made in a foreign country it is entitled to enquire whether, though the contract may be valid according to the laws of that country, it violates some moral principle which, if it is not, ought to be universally recognized. The distinction which Wright, J., drew between physical and moral duress the Court of Appeal found not to be tenable. In their view all duress is immoral. As the Master of the Rolls puts it, "What does it matter what particular form of coercion is used, so long as the will is coerced?"

BAILMENT—MASTER AND SERVANT—UNAUTHORIZED ACT OF SERVANT—INJURY TO ARTICLE BAILED—LIABILITY OF MASTER.

Sanderson v. Collins (1904) 1 K.B. 628, is one of those cases calculated to provoke a good deal of difference of opinion. It turns on the somewhat thorny law of bailments. The plaintiff was a carriage builder and had lent the defendant a carriage to use whilst his own was being repaired. The defendant's servant, without his authority, and not in the course of his employment, took the plaintiff's carriage out for his own purposes and got drunk, and while driving it ran into a tram-car whereby the carriage was damaged. The question therefore was, whether the master was liable to the plaintiff for the injury thus done to the carriage. The case was tried in a County Court, and the County Court judge held that the defendant was not liable. On the other hand the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) held that he was liable, following, as they supposed, *Coupe Co. v. Maddick* (1891) 2 Q.B. 413 (noted ante vol. 27, p. 524); but the Court of Appeal (Collins, M.R., and Romer and Mathew, JJ.) distinguished that case, on the ground that the servant there, though exceeding his instructions, was acting in the course of his employment, whereas in the present case he was not. As the Court of Appeal puts it, a bailee is not responsible if, without his fault, the article bailed is stolen, so neither is he responsible if, without his fault, the article bailed is injured by some stranger. At the same time it does seem somewhat hard that as between the bailor and the bailee the latter should not be answerable for the act of his servant; the answer the Court makes to that, however, is, that in doing the act which resulted in the damage the servant was doing an unauthorized act, and therefore qua that act he was not the defendant's servant, which is one of those refinements of law which the average man will hardly think looks like common sense.

CHARTER-PARTY—FREIGHT AT THE RATE PER TON OF CARGO SHIPPED—FREIGHT PAYABLE ON RIGHT AND TRUE DELIVERY OF CARGO—LOSS OF PART OF CARGO—BILL OF LADING FREIGHT COLLECTED BY SHIPOWNER—RIGHT OF CHARTERER TO RECOVER DIFFERENCE BETWEEN FREIGHT COLLECTED AND FREIGHT DUE FOR CARGO DELIVERED.

The *London Transport Co. v. Treckmann* (1904) 1 K.B. 635, was an action brought by the plaintiffs as charterers of a vessel to recover a sum alleged to have been received by the shipowners for freight in excess of the freight actually earned owing to a loss of

part of the cargo. The charter-party provided that the freight should be at the rate of 10s. 6d. per ton gross weight of cargo shipped, "payable on right and true delivery of the cargo." The vessel loaded a cargo, but on the voyage part of it was lost. The remainder was delivered at the port of discharge, and the full amount of freight reckoned on the total cargo shipped was collected by the shipowners. The plaintiffs claimed to recover as money had and received to their use the difference between the freight reckoned on the cargo actually delivered, and that shipped. Walton, J., held that they were entitled to recover, and the Divisional Court (Lord Alverstone, C.J., Collins, M.R., and Romer, L.J.) affirmed his decision. Romer, L.J., dissentiente, he being of opinion that the freight, though fixed at so much per ton, was in fact a bargain for a lump sum, and therefore that the shipowners were entitled to the whole freight notwithstanding the partial loss of the cargo.

SHIP—DAMAGES FOR DETENTION OF SHIP—NEGLECT TO DISCHARGE CARGO—
BILL OF LADING—CARGO TO BE DISCHARGED "AS FAST AS THE STEAMER
CAN DELIVER OR GOODS WILL BE LANDED."

The Arne (1904) P. 154, was an action by shipowners against the consignees of a cargo for damages for detention of the ship. The bill of lading provided that the consignees were to discharge the cargo as fast as the steamer could deliver "or the same will be transhipped into lighters or landed." The consignees were guilty of delay in discharging the cargo owing to a scarcity of wagons. The County Court judge who tried the action thought that by the terms of the bill of lading the shipowner's only remedy in the event of delay was to transfer into lighters or land the cargo; but the Divisional Court (Jenue, P.P.D., and Barnes, J.) reversed his decision, holding that the shipowner had an option either to pursue his ordinary remedy for damages, or tranship, and further that the shipowner was entitled to damages as the consignees had failed to shew that they had done their best in the circumstances to make the appliances of the port available for the discharge of the cargo.

PRACTICE—CONTEMPT—MOTION BY PARTY IN CONTEMPT.

Gordon v. Gordon (1904) P. 163, though a divorce case, deserves attention because of the point of practice which it involves. It is well known that the general rule is that a party in contempt cannot

make any application to the Court until he has first purged his contempt. This rule, however, is subject to an exception as this case illustrates, viz, that the rule only applies to voluntary applications by the contemnor, i.e., when he comes into court asking for something, but does not preclude him from applying to set aside an order which he claims to be erroneous. In this case the applicant in contempt moved to vary an order made against her ordering costs to be paid out of her separate estate notwithstanding it might be subject to a restraint against anticipation, and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), being of opinion that the order was erroneous in this respect, it was varied accordingly.

NOTARY—APPOINTMENT OF COLONIAL NOTARY BY MASTER OF FACULTIES.

Bailleau v. Victorian Society of Notaries (1904) P. 180, is referred to here not because it can be considered to have any authority here, but because of the fact that the Master of the Faculties of the Archbishop of Canterbury, under the powers conferred by 25 Hen. 8, c. 21, appointed a notary for the State of Victoria. This is a matter of constitutional interest. Notaries in England prior to the Reformation were quasi ecclesiastical officers, or, perhaps it would be more correct to say, public officers deriving their authority from the ecclesiastical authority. This jurisdiction of appointing notaries, which had originally been exercised by the Roman Emperors, was one of those numerous imperial powers which in process of time had been assumed by the Roman Pontiffs who regarded themselves in this, as in many other respects, as the natural heirs of imperial prerogatives, and so it had come to pass that this, with many other appointments, was a fruitful source of revenue to the Holy See. One of the first of the Reformation Acts was to cut off the Papal jurisdiction in this matter, and the power of appointing notaries was vested in the Court of Faculties of the Archbishop of Canterbury by 25 Hen. 8, c. 21, s. 3. It is somewhat surprising at this late day to find that jurisdiction being exercised in Australia, and no doubt the various States of Commonwealth will ere long provide by local legislation for such appointments as has been done by the various Provinces of Canada.

INSURANCE—LIFE POLICY—MUTUAL ASSURANCE—STIPULATION AS TO PARTICIPATION IN PROFITS—POWER OF COMPANY TO ALTER RIGHTS OF POLICY HOLDER BY BY-LAW.

Baily v. British Equitable Assurance Co. (1904) 1 Ch. 374, is an important decision on a point of insurance law. The defendant company had a department called "the Mutual Life Assurance Department," and by a by-law made in 1854 they provided that the profits of that department, ascertained triennially, should, after deduction of expenses, be divided among the policy holders in that department. The plaintiff effected an insurance in that department while the by-law was in force. The deed of settlement under which the company was constituted provided that the profits should be divided as provided by by-law, and that any provision of the deed and every by-law might be altered by by-law. After the plaintiff's insurance was effected, and while it was still in force, the defendant company passed a by-law making a different division of the profits, and one less beneficial to the plaintiff, and the question was whether this could be validly done as against the plaintiff; and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed the judgment of Kekewich, J., holding that the company could not by a subsequent by-law altering its articles justify a breach of contract, and that the attempted alteration in the division of the profits was therefore inoperative as against the plaintiff.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

[Que.] WHITING v. BLONDIN. [March 10.
Contract—Condition precedent—Right of action.

In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial judge refused leave to amend the claim by adding a count for quantum meruit. He found that the works were still incomplete at the time of action, but entered judgment in favour of the plaintiffs for a portion of the contract price with nine-tenths of the costs. The defendant appealed from this decision and the trial court judgment was affirmed by the court of review.

Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished and the plaintiffs had no right of action under the contract. Appeal allowed with costs.

Laflaur, K. C., and *Cate*, for appellant. *Belcourt*, K. C., and *Panneton*, K. C., for respondents.

[Que.] CHAMBLY MANUFACTURING CO. v. WILLET. [March 25.
Appeal—River improvements—Continuing damages—Contract—Protective works—Discretion of court below—Practice—Exception—Acquiescence—Motion to quash.

Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly Rapids, in the Richelieu River, the parties entered into an agreement respecting the construction of dams and other works at the locus in quo, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges or roads, any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions.

Held, reversing the judgment appealed from, that under the agreement the plaintiff could recover only such damages as he might suffer from

time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream and that, in the special circumstances of the case, the courts below erred in decreeing the construction of protective works, inasmuch as the company was entitled to take the risk on payment of indemnity as provided by the contract.

Where a respondent, on an appeal to the court below, has failed to set up the exception resulting from acquiescence in the trial court judgment, as provided by art. 1220 of Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada. Appeal allowed with costs.

R.C. Smith, K.C. and Campbell, K.C., for appellants. Lafleur, K.C. and Aime Geoffrion, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Falconbridge, C.J. K.B.]

[Jan. 5.]

HARRINGTON v. SPRING CREEK CHEESE CO.

Registry laws—Easement—Artificial waterway—Parol permission—User—Subsequent unregistered grant—Notice—Prescription.

In 1871 the defendants' predecessor in title, with the permission (not in writing) of the plaintiff's predecessor in title, laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878, the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now;" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887, became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature.

Held, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse

time since to give the defendants a right under the statute or by prescription. Judgment of Falconbridge, C.J., reversed.

Douglas, K. C., and *W. T. McMullen*, for plaintiff, appellant.
McNour, K.C., and *G.F. Mahon*, for defendants.

[*Boyd*, C.] GRAND TRUNK R.W. CO. v. VALLIAR. [Jan. 25.

Private way—Easement—Prescription—Railway—Station grounds—Implied grant—Powers of railway company—Benefit of railway—Superfluous lands—Way of necessity.

The defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years.

Held, that the right must rest upon the presumption of a grant, and if actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid.

The use on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway: 12 Vict. c. 196.

In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament were made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (D) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose.

Held, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was the land required for its purposes; and the defendant had, therefore, failed to establish his right.

Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises.

Held, that, even assuming that he had acquired title to the strip by prescription, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet.

Judgment of *Boyd*, C., reversed; *Osler*, J.A., dissenting.

Riddell, K.C., and *Rose*, for plaintiffs, appellants. *McCullough*, and *Keown*, for defendant, respondent.

From Co. J., Simcoe.] IN RE ORILLIA AND MATCHEDASH. [Jan. 25.
*Assessment and taxes—Exemptions—Property of municipality situate in
 another municipality.*

Upon the proper construction of s. 7, sub. s. 7, of the Assessment Act, R.S.O. 1897, c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by a town corporation under a special Act, 62 Vict. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable, with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation.

Judgment of Judge of County Court of Simcoe reversed.

D. Inglis Grant, for the town appellants. *Brokovski*, for the township respondents.

From Britton, J.] IN RE ROSS AND DAVIES. [Jan. 25.
*Executor and administrator—Power of executor to sell lands—Payment
 of debts—Lands devised in fee—Executory devise over—Devolution of
 Estates Act, ss. 4, 9, 16—Trustee Act, ss. 18, 20.*

A testatrix by her will gave to her daughter some personal effects and \$4,000 to be paid to the daughter by the son of the testatrix, and charged on property devised to the son; all the rest of her real and personal property she gave, devised, and bequeathed to the son, charged with the \$4,000. The will then directed that in case of the death of either the son or daughter without issue, the whole of the property and estate was to go to the survivor, and in case of the death of both without issue, to the brothers and sisters of the testatrix. The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence. At the time of the death of the testatrix, her estate, including the land which was the subject of the contract, was incumbered, and there were other debts.

Held, that the executors, even without the concurrence of the son and daughter, and a fortiori with their concurrence, could make a good title, either under the Devolution of Estates Act, R.S.O. 1897, c. 127, ss. 4, 9, 16 or under the Trustees Act, R.S.O. c. 129, s. 18. Sec. 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purpose of distribution where there were no debts as well as where there were debts; and the consent of the official guardian on behalf of infants, lunatics, and non-concurring heirs of

devisees, is only necessary when the sale is for purposes of distribution only. The power of sale given to executors by s. 18 of the Trustee Act is exercisable in this case, notwithstanding the last clause of s. 20; "a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remainder to one or more others, either jointly or successively, and with, it may be, executory devises over still other persons, so that his whole fee simple, or less estate, whatever may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common.

In re Wilson, Pennington v. Payne, 54 L.T.N.S. 600, 2 Times L.R. 3, approved.

Judgment of BRITTON, J., affirmed

Ritchie, K.C., for appellant. *D.C. Ross*, for respondents, the executors.

HIGH COURT OF JUSTICE.

[Credith, C.J.C.P.] *LANGLEY v. KAHNERT*.

[Jan. 2.

Bankruptcy and insolvency—Goods in possession of insolvent—Agreement between insolvent and vendor—Construction—Sale or agency for sale—Bills of Sale Act, R.S.O. 1897, c. 148, s. 41.

Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit, but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant, when the goods were from time to time delivered to the company. The company had also the right, whether they had made sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold. The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having retaken the goods:—

Held, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, if and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list.

Ex p. White, L.R. 6 Ch. 397, and S. C. in appeal, sub nom *Towle v. White*, 21 W.R. 465, 29 L.T.N.S. 78, explained and distinguished.

Held, also, that section 41 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148, did not apply to this case; it refers to sales, or transfers in the nature of sales, by which the possession is to pass presently, but not the property in the merchandise until the agreed price or consideration is paid. *Mason v. Lindsay*, 4 O.L.R. 265, applied.

W. R. Smyth, for plaintiff. *F. A. Anglin*, K.C., for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[Jan. 12.]

HUFFMAN v. RUSH.

Limitation of actions—Real Property Limitation Act—Wild land—Boundary—Entry—Occupation—Evidence of possession—Survey.

In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot.

Held, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation.

Semble, that even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner.

Davis v. Henderson, 29 U.C.R. 344, distinguished. *Harris v. Ludie*, 7 A.R. 414, and other cases, considered.

Held, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it.

Proper method of ascertaining the true position of the dividing line between lots pointed out.

Brewster, K.C., for plaintiff (appellant). *Harley*, K.C., for defendants (respondents).

Street, J.]

IN RE ABEEL.

[Jan. 25]

Extradition—Forgery—Uttering forged document—Letter of Introduction—Intent—Criminal Code, ss. 422, 424.

There was evidence that the prisoner handed to a young woman in charge of an office of the Western Union Telegraph Co. a letter purporting to be signed by a vice-president of that company, in these words: "To any employé, Western Union Telegraph Co. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any

ors shewn him will be duly appreciated by the corporation and myself. 'The vice-president whose name was used did not himself sign it, nor authorize anyone else to sign it for him, nor was he aware of it. There is evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document.

Held, that the facts were sufficient to make out a prima facie case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine to her own prejudice within the meaning of s. 422 of the Criminal Code; and therefore a prima facie case of uttering a forged document within the meaning of s. 424; and the order for extradition was right.

The language used in s. 422 is intended to extend to cases which would have come within any former common law or statutory definition of forgery in force in Canada.

German, K.C., for prisoner. *Riddell*, K.C., for United States Government. *Cowper*, for prosecutor.

et, J.] SMITH v. GREER. [Jan. 26.

Partnership—Dissolution—Solicitors—Goodwill—Right to firm name—Acquiescence—Abandonment—Injunction—Parties.

Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property; and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that no man has a right to hold out of his late partner as still being his partner in business, contrary to the fact. *Burchell v. Wilde*, (1900), 1 Ch. 551, followed.

A firm of solicitors had carried on business as "Smith, Rae & Greer" from 1897 to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer."

Held, that both names must be taken to have formed part of the goodwill of the firm at the time of the dissolution.

At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae & Greer." The fourth, the defendant, protested against the others assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession and the public, that he had severed his connection with the firm of Smith, Rae & Greer and Smith and Greer, and intended to carry on his own business under his own name. For nearly ten and a half months he adhered to this position, frequently addressing his late partners

as "Smith, Rae & Greer," and permitting them to acquire the right to be known by that name as its sole owners.

Held, that he could not, after this conduct and lapse of time, assume the name of "Smith, Rae & Greer," and that the members of the firm who had adopted that name were entitled to have him enjoined from using it. *Levy v. Walker*, 10 Ch. D. 436, 448, followed.

Rae had at one time been a member of the old firm of Smith, Rae & Greer, but had ceased to be so for some years before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor.

Held, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendant as a partner as entitled him to an injunction.

Shepley, K.C., for plaintiffs. *Aylesworth*, K.C., and *W. N. Tilley*, for defendant.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[Jan. 30.

MARKLE v. DONALDSON.

Master and servant—Injury to servant—Workmen's Compensation Act—Defect in ways, works, etc.—Person intrusted with duty of seeing that condition is proper—Fellow servant—Negligence.

The plaintiff was employed by the defendants as a carpenter, and was engaged in shingling a building when a cleat which he was using as a means of support gave way, and he was thrown to the ground and injured. There was evidence that the cleat gave way owing to one of the shingles to which it was attached not having been properly fastened to the roof, and that the mode adopted of fastening it and the other cleats on the roof was an unsafe one. It did not appear by whom the cleats had been put on; they were on before the plaintiff began to shingle the roof; and he was not one of the workmen employed on the building when they were put on.

Held, that the cleat was a part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of sub-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats. The defendants would be answerable for that negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of sub-s. 1 of s. 6. Differences between sub-s. 1 of s. 6 and the corresponding provision of the English Act pointed out.

Under sub-s. 1 of s. 6 of the Ontario Act the employer is answerable, far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he trusts the duty mentioned in the sub-section, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the Common Law had he taken upon himself personally the performance of the duty; and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that person is one intrusted with the duty of seeing that the appliance is proper. *Giles v. Thames Iron Works Shipbuilding Co.*, 1 Times L.R. 9, and *Ferguson v. Galt Public School Board*, 27 A.R. 480, followed.

In this case it made no difference that it was not shewn that any one had been employed to put on the cleats as a separate piece of work; the defendants knew that the cleats were required and would be put on by the workmen whom they sent to do the work of shingling. If the plaintiff had been the workman intrusted with the duty, or even one of a number of workmen sent to do the work of shingling, different considerations would apply.

Lynch-Staunton, K.C., for plaintiff. *Riddell*, K.C., for defendants.

Alconbridge, C.J.K.B., Street, J., Britton, J.] [Feb. 5.
LEONARD v. BURROWS.

*Appeal—County Courts—Order dismissing appeal from taxation of costs—
Final or interlocutory.*

An order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R.S.O. 1897, c. 55, and no appeal lies therefrom to a Divisional Court or to the High Court.

Blakey v. Latham, 43 C² D. 23, followed. *Babcock v. Standish*, 19 R. 195, distinguished. In *Kreutziger v. Brox*, 32 O. R. 418, the question of the right to appeal was not raised or considered.

M. C. Cameron, for defendant. *W. H. Blake*, K. C., for plaintiffs.

Alconbridge, C.J.K.B., Street, J., Britton, J.] [Feb. 20.
OSTERHOUT v. OSTERHOUT.

*Will.—Construction—Bequest of personalty—"Reversion"—Gift over—
Life interest—Absolute interest.*

The testator by his will gave, devised and bequeathed to his father one-half of my ready money, securities for money . . . and one-half of all other my real and personal estate whatsoever and wheresoever,

with reversion to my brother on the decease of my father;" and gave, devised and bequeathed to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank.

Held, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely. *In re Percy*, 24 Ch. D. 616, *In re Jones, Richards v. Jones* (1898), 1 Ch. 438, and *In re Elma Walker* (1898), 1 Ir. 5, distinguished.

Judgment of MACMAHON, J., reserved.

George Kerr and Joseph Montgomery, for plaintiff. *Widdifield and Middleton*, for defendant.

Boyd C.]

HARRISON v. HARRISON.

[Feb. 20.

Will—Devise—Accumulation over twenty-one years—Contingent interest—Non-acceleration—Executors' duty for twenty-one years—R.S.O. 1897 c. 332—Provision against litigation—Construction of will—Adverse litigation.

The testatrix who died on Feb. 14, 1892, devised certain money and lands to her executors and trustees with directions to invest and keep invested and reinvested (compounding interest) until March 17, 1915, when the whole accumulated fund was to be handed over to the plaintiff if, he was then alive. But if he died at an earlier date, leaving living issue then to his children, and if he died without leaving any living issue then to the other children of the testatrix.

Held, that the illegal part of the will was not in payment of the corpus in 1915 but in the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be divested if he did not live until 1915: that the court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest but that in this case there is no acceleration in the enjoyment of any interest under the will as an effect of the statute R.S.O. 1897, c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment: that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years: that for the following two years the accumulation must cease and the income be paid out to those entitled, personalty to the next of kin and realty to the heirs at law if the plaintiff is then alive.

Held, also that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against adverse action against the testatrix's bounty.

Mabee, K. C., for plaintiff. *Idington*, K. C., for executors. *R. S. Robertson*, for other members of the family.

[Alconbridge, C.J.K.B.]

[March 25.

IN RE GEORGE M. ROSS.

Will—Construction—Condition subsequent.

Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease."

Held, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, not a condition precedent to the acquisition of the land devised, but a condition of its retention.

Delamere, K. C., for executors. *C. A. Moss*, for Robert and Mary Fraser.

[Dwyer, C.]

[March 30.

DUNN v. BOARD OF EDUCATION OF TORONTO

Public Schools—Collegiate Institute—Dismissal of teacher—Investigation by committee of Board—Reports of committee and inspector—Power to dismiss without investigation, or on report—Suspension of teacher after injunction—Contempt—Voidable order—Costs.

Plaintiff, a school teacher in a collegiate institute managed by the defendants, was requested to resign, which she refused to do, making charges against the principal of her institute, and demanding an investigation. A committee of the defendant Board held an enquiry, examining the plaintiff and others separately, and refusing to allow counsel to be present or have shorthand notes of the proceedings taken, the result of which was a resolution demanding her resignation, or the Board would commend her dismissal to the Board. A motion to continue an injunction restraining the Board from acting on the committee's resolution, and to commit certain members who, after the injunction had been granted, had carried a resolution to suspend the plaintiff. It was:—

Held, 1. The power of dismissal, if deemed needful, without parley or investigation, would appear to be essential to proper discipline.

2. The members of the Board were honorary trustees of the property held for the purposes of public education, but their relation towards the staff of teachers is not in any legal or equitable sense fiduciary.

3. Their power and duty is to employ "teachers, officers and servants," and "to appoint and remove such teachers, officers and servants as they may deem expedient."

4. The members of the Board are the judges of what they deem expedient in each particular case. In the matter of removal or dismissal of a teacher they may institute an investigation, or they may dispense with it and proceed on their own conviction of what is right from a general knowledge of the situation; they may act on the report of the provincial inspector even if irregularly obtained, if they are satisfied with it; and they may remit the matter to a committee and act on its report.

5. Cases of charitable endowments in which property is clothed with a trust for the maintenance of a schoolmaster considered, and *Willis v. Childe* (1850), 13 Beav. 117, and *Attorney-General v. Magdalen College, Oxford* (1847), 10 Beav. 402 contrasted. *Haman v. Governors of Rugby School* (1874), L.R. 18 Eq. 18 referred to with approval.

6. The injunction was improvidently or erroneously granted, but, while it stood unavowed or not appealed from, it should not be lightly regarded by those enjoined: what was done here was not a violation of its terms, but was in contravention of its reasonable import. The order contemplated the retention of the status quo. The Board suspended the teacher possibly with a view to turn the edge of the injunction, but, as the active members inculpated disclaimed, under oath, any intentional disrespect, the Court marked its sense of what was done by giving the plaintiff the costs.

McBrady, K.C., for plaintiff. *F. E. Hodgins*, K.C., for the Board and some of the trustees. *Godfrey*, for L. S. Levee, a trustee.

Boyd, C.]

RE FULLER v. MCINTYRE.

[April 5.]

Vendor and purchaser—Partnership land—Death of one partner—Conveyance to surviving partner by administratrix—Infants—Consent of official guardian—Personalty.

Two brothers in partnership in business were the owners of certain land as partnership assets which was used in the business. One of them died intestate, leaving a widow and infant children and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died and his personal representative agreed to sell the land.

On an application under the Vendors' and Purchasers' Act R.S.O. 1897, c. 134, in which the purchaser claimed that the consent of the official

Reports an

guardian should be obtained to under sec. 8 of the Devolution

Held, that the latter Act d operation of law upon the perso virtue of the statute and that the in the land in any sense contem

Joseph Montgomery, for ver

Teetzel J.] REX EX REL. M
Municipal councillor—Judgmen
Interest

The object of s. 80, of Mu as to prevent anyone being el sonal interest might clash with the tract" used therein must be con of a Municipal Council against v judgment for costs was unseated Judgment of the County Court c
J. H. Spence, for the appeal.

Province

SUPR

Full Court.] McN
Promissory note—Agr

To plaintiff's claim against for \$238.58, the defence was se forbearance to commence proce solemn form of the will of A.C. account of a legacy to which sl children a sum of money to be c children, and that plaintiff not h requested defendant to sign a no by plaintiff to a firm which had said note was given on the unde it became due and would dedu defendant as guardian of her sai

Held, reversing the judgment of the County Court Judge in defendant's favour that defendant having violated her agreement by commencing proceedings in the Probate Court and having succeeded in setting the will aside, could not set up the agreement as a defence to plaintiff's action on the note.

Per RITCHIE, J., dissenting, that the trial judge having found all the facts in defendant's favour, one ground being that the note sued on was accommodation, there was no reason for not accepting his view.

In an action on a second note for the sum of \$150, defendant, on the trial, sought to give evidence to shew that the note, although expressed to be payable on demand, was made subject to a condition that defendant should not be called upon for payment unless her children should die before a legacy to which they were entitled under the will of A.C. should become payable.

Held, affirming the judgment of the County Court Judge, that the note being absolute on its face evidence could not be given to vary its terms, there being no evidence to shew that it was given on a condition, or as an escrow, or only to be treated as a note in a certain event.

W. A. Henry, for appeal. *W. B. A. Ritchie*, K.C., contra.

Full Court.] *AKTIESELSKABET HECKLA v. S. CUNARD & CO.* [March 8.

Charter of vessel—Contract made by letter and telegram.

Plaintiffs, through their agents H., and defendants negotiated for the chartering by plaintiffs to defendants of the steamer T., then at Chatham, N.B. Defendants desired to have the steamer delivered to them at North Sydney, but, after some negotiation, on the 9th October, offered to take delivery at Chatham and use the vessel for three months if navigation remained open. Plaintiffs declined to take the risk of navigation remaining open, and on October 15th plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day plaintiffs' agents replied "have closed in accordance your telegram to-day and arranged delivery North Sydney." On the following day defendants replied "Telegram received closing T. Try to get her delivered North Sydney end October."

Held, 1. dismissing defendants' appeal, that defendants, by their telegram of October 15th, in view of previous correspondence, disclosed an intention to authorize a contract accordance to what had already been expressed in writing and that the reply to that telegram conveyed all that was required to embody the terms of the charter.

2. The defendants, when the contract was once concluded, could not by continuing the correspondence and raising other questions escape the effect of the mutual terms previously agreed upon.

Harris, K.C., for appeal. *T. R. Robertson*, contra.

Full Court.] DONHAM v. POOR DISTRICT 11, CLARE. [March 8.

Pauper, medical attendance upon—Liability of overseers.

In an action by plaintiff against the defendant overseers to recover expenses for medical attendance upon a pauper, it was shewn that the pauper in question was chargeable to defendants, that he was in urgent need of medical attendance; that defendants were informed that such attendance would be required and failed to provide it, and that they were aware of the fact that plaintiff was affording medical aid.

Held, per RITCHIE and MEAGHER, JJ., that plaintiff could not recover.

Per WEATHERBE and TOWNSHEND, JJ., that where the necessity for relief was brought home to the overseers, and there was a request for relief, however informal, and a neglect to provide relief, there was a liability under R.S., c. 51, s. 29. The words of the section in question are "The overseers shall pay any expense which has been necessarily incurred for the relief of any pauper entitled to relief from such overseers by any person who is not liable for the support of such pauper if he has before incurring such expense requested such overseers to furnish such relief and no provision has been made for such pauper."

Held, per MEAGHER, J., inter alia, that the request shewn, if any, was by the father of the pauper and was not sufficient to support an action by plaintiff.

J. J. Ritchie, K.C., for appeal. *H. Mellish* K.C., and *J. A. Grierson*, contra.

Full Court.] BURCHELL v. BIGELOW. [March 8.

Registry Act—Imperfect registration—Not constructive notice.

The execution of a mortgage by a married woman who owned land in her own right was not proved by acknowledgment under oath, or by the oath of a subscribing witness, as required by the Registry Act, R.S. 1900, c. 137, s. 25, but the certificate of a justice of the peace was indorsed upon the mortgage of the declaration of the married woman that she "signed, sealed and delivered the same as and for her act and deed freely and voluntarily without fear, threat or compulsion, etc." There was no certificate of the execution of the instrument in the presence of the justice as required by the Act, s. 28.

Held, affirming the judgment of the Trial Judge that the proof of execution being defective the conveyance should not have been registered and that the registration was illegal and of no effect and would not operate as constructive notice to a third party. And the plaintiff a subsequent purchaser who had no actual notice was not affected by it.

As to the effect of improper registration see *Heister v. Fortner*, 4 Am. Dec. 417 and *Carter v. Champion*, 21 Am. Dec., and cases cited.

J. A. Chisholm, and *H. V. Bigelow*, for appeal. *H. Mellish*, K.C., and *C. J. Burchell*, contra.

Full Court.] PETITPAS v. COUNTY OF PICTOU. [March 8.

Public Health Act—Destruction of private property to prevent spread of infectious disease—Liability of municipality for

The Public Health Act, R.S., c. 102, s. 32, provides that "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease shall be a charge against the municipality."

In an action by plaintiff against the defendant municipality to recover the value of personal property destroyed as alleged by direction of the board of health during an epidemic of small-pox for the purpose of preventing the spread of the disease.

Held, allowing with costs defendant's appeal from the judgment entered in favour of the plaintiff, that in the absence of proof of proper authority for the destruction of the property, neither the board nor the municipality could be held liable.

Per WEATHERBE, J., that assuming the property to have been destroyed by order of the board, there was no provision in the Act to render the municipality liable to make compensation for the destruction of infected property dangerous to the public health.

TOWNSHEND, J., dissented.

H. Mellish, K.C., E. M. Macdonald and W. B. Ives, for appeal. E. L. Gerroir, contra.

Full Court.] ROSS v. MORRISON. [March 8.

Canada Temperance Act—Sale of liquor to be disposed of contrary to provisions—Action to recover price.

To an action by plaintiff for goods sold and delivered, defendant pleaded that plaintiff's claim, if any, was for the price of intoxicating liquors sold by plaintiff to defendant at North Sydney, in the County of Cape Breton, the plaintiff well knowing that the same were to be sold and were actually sold within said county, in which the second part of the Canada Temperance Act was at the time of such sale in force and effect. The date of purchase of the liquor and the price were admitted. Also that plaintiff knew that the Canada Temperance Act was in force in North Sydney where defendant was carrying on business as a dealer in intoxicating liquors. Also that the order for the liquor was given by defendant to an agent of plaintiff at North Sydney, such order being subject to the approval of plaintiff. Defendant proved that the liquor in question was purchased through D., with whom he had dealt as an agent for the sale of liquor for a number of years, and that when he made the purchase D. was aware that defendant was in the retail trade.

Held, dismissing plaintiff's appeal with costs that there was sufficient ground to justify the judgment for defendant.

Fullerton, for appeal. O'Connor, contra.

Reports and Notes of Cases.

ll Court.]

PARKER v. IRVINE.

Verdict—Failure of jury to agree.

In an action based upon a contract for the exchange of horses, the plaintiff alleged by plaintiff that it was a part of the contract that defendant's horse was of a kind and quiet and would make a good team horse. The defendant answered to questions submitted that defendant's mare was not of that kind and quiet and was not a good team horse, but they were unable to agree whether such a representation was made at the time of the contract.

Held, that there must be a new trial, the jury having failed to agree on one of the principal issues submitted to them.

Roscoe, K.C., for plaintiff. *T. R. Robertson*, for defendant.

ll Court.

IN RE ALICIA CULLEN.

Will—Defective execution—Probate.

The last will and testament of A.C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not appear to be the true will of the deceased, that deceased did not know or agree to it, that it was not properly executed, not having been "signed, sealed, and delivered" by deceased in the presence of two or more witnesses present at the same time, etc. The evidence taken before the Surrogate Judge was that at the time the will was executed deceased was present, but standing about fifteen feet away from the witnesses; that the words of the will were read over in a low tone so that the witnesses were not sure whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will, nor that he signed or that he saw it if it was there and both agreed that the signature was there deceased did not in their presence acknowledge the signature, nor did they hear her asked the question whether she acknowledged the signature, nor was there evidence of any other act or conduct which could be considered the equivalent of an acknowledgment. As to the evidence of the witnesses she said nothing and appeared different as to what was going on. One of the witnesses was asked whether after leaving whether he had witnessed a will or not.

Held, affirming the judgment of the Surrogate Judge, that the will was not proved to the probate of the will, that assuming it to be true as sworn by the witnesses in support of the will, that deceased was asked in presence of the witnesses whether this was her will and whether she wished the witnesses to prove it. The evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer.

W. B. A. Ritchie, K.C., for appeal. *Harris*, K.C., contra.

Full Court.]

GRANT v. GRANT.

[March 8.]

Order taken on judgment—Need not follow exact terms—Power of judge to vary.

On motion for an attachment for contempt the learned judge before whom the motion was made allowed it with costs, and concluded his judgment by saying that the defendant must in addition to paying the costs undertake not to publish or circulate anything calculated or liable to prejudice the course of justice in respect to the action while pending, and that he must also publish in an early number of *The Truth* an expression of regret for having published therein anything touching this action. The order taken out was granted in different terms, requiring the defendant to deposit with the prothonotary of the court a statement under his hand stating his regret at having made such publication and undertaking not to publish further comments upon this suit, etc.

Held, that the order not having been drawn up at the time judgment was delivered there was no necessity for following the terms of the written decision, but that it could be varied in any way that seemed proper to the judge, and that the case was one in which an appeal would not lie.

Drysdale, K.C., for appeal. *W. B. A. Ritchie*, K.C., and *T. R. Robertson*, contra.

Full Court.] ATTORNEY-GENERAL EX REL. DOMINION IRON [March 8.]
AND STEEL CO. v. MCGOWAN.

Crown grant—Jurisdiction to vacate—Fraudulent concealment—Town Incorporation Act—Effect of, in vesting streets in town—Expropriation.

Defendant in making application for a grant of land from the Crown represented that the land applied for was "near" the town of Sydney when in fact it was in said town. Also that the land was "unoccupied and unimproved" when in truth, to defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works.

Held, affirming the judgment of *RITCHIE*, J., in favour of plaintiff, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside. The land in question was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used and was wider than was required for the purpose, and out of which some grants had been

de. By the provisions of the Towns Incorporation Act, R.S., c. 71, s. 2, all public streets, roads, etc., were vested absolutely in the town, and the town council were given full control over the same.

Quare, whether, after the passage of this Act, the Crown had any other control over the portion of the Cornish town road lying within the limits of the town.

Held, that the statute was not to be construed as not applying to the land in question merely because it had not been used or was wider than was required, and that the grant was one which the court had jurisdiction to vacate.

The right of the town to expropriate the land in question was contested on the ground that being Crown land the Act enabling the expropriation to be made (Acts of 1899, c. 24) did not apply.

Held, that the absence of authority, if any, was removed by the act of ratifying and confirming the expropriation proceedings (Acts of 1900, c. 1).

T. R. Robertson, for appeal. *H. A. Lovett*, contra.

[All Court.] PAULIN v. TOWN OF WINDSOR. [March 8.

Will—Bequest for public purposes—Fulfilment of condition—Words “or otherwise”—Ejusdem generis.

G.P.P., by his last will and testament, directed his executors to transfer and pay over to the corporation of the town of W. the sum of \$20,000 to assist in building, maintaining and supporting a hospital . . . so much as the like sum . . . should be procured by the corporation by a loan on the citizens or from private donations or otherwise to be added to the said bequest.” The corporation claimed that the sum of \$20,000 required had been procured by means of a grant of the sum of \$14,000 from the Province of Nova Scotia and by private donations, and claimed payment of the sum of \$20,000 by the executors.

Held, that the obtaining of the sum granted by the province carried out the obvious intention of the testator, viz., the establishment of an hospital and was covered by the words “or otherwise” in the will, and that the corporation was entitled to claim payment of the legacy.

Per WEATHERBE, J., dissenting, that the words “or otherwise” must be read as referring to other sources ejusdem generis. Also that the sum granted by the legislature of the province was not given for such an hospital as that contemplated by the will, viz., “an hospital for the use of the inhabitants of the town of W.”

W. B. A. Ritchie, K.C., for appeal. *H. Mellish*, K.C., and *J. A. MacKay*, contra. *W. M. Christie*, for executors.

Province of New Brunswick.

SUPREME COURT.

Barker, J.]

HAWTHORNE v. STERLING.

[Sept. 15, 1903.]

Account—Jurisdiction—Master and servant—Division of office—Receipts—Discovery.

In a suit for account plaintiff stated that he was appointed deputy-sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have one-half of the fees from writs and executions only. On the probabilities of the evidence the court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share the fees in one case amounting to \$35.00, alone remained undivided.

Held, that the bill should not be dismissed.

Phinney, K.C., for plaintiff. *Gregory*, K.C., for defendant.

Barker, J.]

CROSBY v. TAYLOR.

[Nov. 17, 1903.]

Interrogatories.

The bill alleged that a testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the said son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed:

Held, sufficient.

Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference.

F. R. Taylor, for plaintiff. *Allen*, K.C., for defendant.

Barker, J.]

SMITH v. WRIGHT.

[Dec. 19, 1903.]

Fraudulent conveyance—13 Eliz., c. 5.

A son living on a farm owned by his mother, worth about \$700, and who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, expressed dissatis-

tion with the arrangement, and refused to continue it. A conveyance of the farm was thereupon made to him for \$500, his contributions from his earnings being placed at \$300, and the balance being paid by cash and a horse. At the time the mother was indebted to the plaintiff in the sum of \$131.00.

Held, that the conveyance was not fraudulent under 13 Eliz., c. 5.

W. P. Jones, for plaintiff. *F. B. Carvell*, for defendant.

arker, J.] **TURNER v. TURNER.** [Jan. 19.
Jurisdiction—Probate.

Probate of a will devising real estate is not conclusive evidence of the validity of the will in this court.

Teed, K.C., for plaintiff. *Jordan*, K.C., for defendant.

arker, J.] **BURDEN v. HOWARD.** [Jan. 19.
Breach of injunction—Motion to commit—Costs.

Where in the suit for a declaration that the plaintiff and defendant were partners, the defendant in breach of an interim injunction order collected debts due the firm, but which subsequently to the service of a notice of motion for his commitment he paid to the receiver in the suit, he was ordered to pay the costs of the motion.

Teed, K.C., for plaintiff. *Jordan*, K.C., for defendant.

arker, J.] **CUSHING SULPHITE CO. v. CUSHING.** Jan. 19.
Company—Managing director—Powers—Breach of trust—Pleading—Fraud—Costs.

The defendant promoted the formation of the plaintiff company for the manufacture of pulp upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood by the company. P., residing in England, contributed two-thirds of the capital under an agreement that he was to control the building of the mill, supply the machinery and have the selection of the manager. He was elected president and the defendant was elected managing director of the company. The mill was erected under P.'s plans near the defendant's mill, and was fitted with machinery for the use of mill-wood both as pulp and as fuel. A by-law provided that the managing director should have general charge of the property and business of the company, and he was given by the directors free hand in the management. The defendant without orders, but with the knowledge of all the directors except P., erected at a cost of about 7,000 to the company a fuel house and conveyors thereto from his saw

mill for the conveyance of mill-wood. The expenditure was necessary if the company was to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at \$2.00 per thousand of mill cut on account of which he paid himself \$52,391.30, leaving a balance due of \$10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value to round wood and coal. In the absence of any other than an approximate estimate the court held that it should be charged at \$1.90 per cord for pulp wood and .90 per cord for fuel wood, on which basis the defendant had overpaid himself \$2,432.92. The defendant resigned his position as managing director at the end of ten months, and the company ceased to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which was unsupported at the hearing.

Held, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in plaintiff's favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud.

Powell, K.C., *Teed*, K.C., and *Hanington*, K.C., for plaintiffs. *Pugsley*, Atty.-Gen., *Currey*, K.C., and *Barnhill*, for defendant.

Barker, J.]

WHITE v. HAMM.

[March 25.]

Fraudulent conveyance—13 Eliz., c. 5—Injunction.

A conveyance by an insolvent debtor in good faith and for valuable consideration though made with intent to defeat creditors to the knowledge of the purchaser is not void under 13 Eliz., c. 5.

The defendant in an action for false arrest immediately after a verdict in his favour was set aside and a new trial ordered, conveyed a farm to his wife, which subsequently she conveyed to W., the purchase money being alleged to be paid partly by cash and partly by notes. At the time the conveyance was made by the defendant he was free of debt, and it was doubtful what the result of the action would be. The plaintiff succeeding in the action sought to set the conveyance aside as made without consideration and fraudulent under 13 Eliz., c. 5. An application for an interim injunction restraining the transfer of the land by W. was granted.

Belyea, for plaintiff. *Currey*, K.C., and *Wilson*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

wards, J.] HOUGHTON v. MATHERS. [March 21,
*Practice—Motion for judgment on admissions in pleadings—King's Bench
 Act, Rule 615—Costs.*

Action for specific performance of an alleged contract to sell a certain
 cel of land for \$500. The defence to the amended statement of claim
 ied both the contract originally set up and the allegations introduced
 he amendment, but stated that the defendant had always been ready
 willing to convey the land on payment of the \$500, and offered to con-
 as required by the plaintiffs. Defendant then moved that the case be
 osed of by the court on the offer to convey contained in his pleading,
 relied on Rule 615 of the King's Bench Act, R.S.M. 1902, c. 40,
 ch provides that: "Any party to an action may at any stage thereof
 ly to the court or a judge thereof for such an order as he may, upon
 admissions of fact in the pleadings, or in the examinations of the other
 y, be entitled to; and it shall not be necessary to wait for the deter-
 ation of any other questions between the parties." "(b). The court or
 dge may, on such application, give such relief, subject to such terms,
 y, as such court or judge may think fit."

Held, that the words "admissions of fact in the pleadings" in that
 e are not confined to such admissions made by an opposite party, but
 the Rule may be availed of by the party making the admissions, and
 order made accordingly, and the consent and offer made by defendant,
 ough strictly speaking not an admission of fact, should be treated as one
 he purposes of the Rule, as its object is to save further proceedings
 further costs when the need of trying issues is removed by admissions.

Held, also, that, as defendant by applying in that manner, put it out of
 power of the plaintiffs, to prove their allegations and out of the power of
 court to decide, on the merits, who should pay the costs of the action,
 case should be treated, for the purpose of awarding costs, as if the
 ndant had admitted the truth of the plaintiffs' pleadings, as well as sub-
 ed to the relief asked for, and that the defendant should pay the main
 s of the actions including the costs of the motion.

Elliott, for plaintiffs. *Mathers*, for defendant.

uc, C.J.] KINSEY v. NATIONAL TRUST CO. [March 28.
*Contract—Representation influencing conduct—Promise to devise interest in
 land—Part performance—Statute of Frauds, s. 4—Will—Lapse of
 devise to party who predeceased testator—Acceptance of offer by conduct.*
 The plaintiff was an illegitimate daughter of D. C. Kinsey, who lived
 Vinnipeg with her mother until the plaintiff was about six years old,
 n they separated, the plaintiff going abroad with her mother who

died in 1897. On April 1, 1899, the plaintiff then at service at Schreiber, Ontario, wrote a letter to Kinsey expressing her loneliness and poverty and her great desire to know him better and to have him write to her. After receiving the letter Kinsey talked the matter over with some friends, stating his intention to adopt the girl and make her his heir, and some months afterwards he got a friend to go and see her and report to him what sort of a girl she was. After getting the friend's report Kinsey wrote to the plaintiff encouraging her to come to him and offering to make her his "daughter hard and fast," and to adopt her as his child and lawful heir provided her relations would offer no obstacles to it, sending her money and inviting further correspondence, and adding the following postscript: "Now I have agreed to become your real solid father as hard and fast as you could wish."

Then followed many letters between them resulting in her acceptance of his offer and coming to live with him as his daughter on 25th December, 1899. They lived together as father and daughter until he died suddenly on the 6th June, 1903, leaving no will but one made in 1881. There was no evidence that Kinsey had any other relative left. Plaintiff swore that on various occasions her father told her that all his property would be hers when he died and that he would make a will to that effect. Other witnesses heard him express the same views and intentions, and were shown some of Kinsey's letters to the plaintiff before he mailed them, and it was proved that he had stated that he had no other relations to whom he might leave his property.

Held, that there was a definite offer by Kinsey, in writing, that, if plaintiff would come to him and live with him as his daughter, he would keep her and leave all his property by will to her. That the offer was accepted, if not in formal terms, at least by acts and conduct; that plaintiff had fully performed her part of the contract; that the fact that Kinsey had not made the promised will should be attributed to mere negligence and procrastination, and that plaintiff was entitled to the assistance of the Court by way of specific performance of the agreement, notwithstanding the want of mutuality, which is not material after the one party has performed completely all he had undertaken to do: *Fry on Specific Performance*, pars. 465, 468; *Fitzgerald v. Fitzgerald*, 20 Gr. 410; *McDonald v. McKinnon*, 26 Gr. 12, and *Roberts v. Hall*, 1 A.R. 388, followed.

Completed performance by one party entitles him to enforce a contract against the opposite party, notwithstanding the Statute of Frauds: *McDonald v. McKinnon*, 26 Gr. 12; *Halloran v. Moon*, 28 Gr. 319; *Ridley v. Ridley*, 34 Beav. 478, and *Sappers v. Maw*, 3 Giff. 572; *Maddison v. Alderson*, 8 A.C. 467; *Walker v. Boughner*, 18 O.R. 448; *Cross v. Cleary*, 29 O.R. 542, and *McGugan v. Smith*, 21 S.C.R. 263, distinguished. The last three cases on the ground that, in each of them, the deceased with whom the agreement was alleged to have been made, had clearly shewn

Reports and Notes of Cases.

intention in regard to it by subsequently making a will concerning the same.

By the will made in 1881 Kinsey had left all his property to his son, David Young, his heirs, executors, administrators and assigns, and David Young died in 1887, and the two executors, 1886 and 1890 respectively, and the defendants, National Trust Co., 1903, took out letters of administration, with the will annexed, and the executors of the will of David Young were also made parties to the action.

Held, following Jarman on Wills, pp. 307, 308; Williams on Wills, pp. 1072, 1074. That the bequest and devise to David Young took effect at his death in the lifetime of the testator.

Order for judgment giving the whole estate to the plaintiff, *Haggart*, K.C., and *Manning*, for plaintiff. *Wilson* and *National Trust Co.* *J. Campbell*, K.C., for executors of David Young.

Province of British Columbia.

SUPREME COURT.

[All Court.]

CHRISTIE v. FRASER.

Injunction—Sale of property—Misrepresentation—Rescission

Appeal from an order of IRVING, J., refusing to continue an agreement for the sale of timber limits and logging outfit on the condition that the purchaser should pay in instalments, that he should have possession of the assets sold, but that no property therein should be delivered to the purchaser until the purchase price was fully paid and in default of any instalment the vendors might retake the assets sold. The purchaser did not pay the second instalment and then repudiated the contract and sued for rescission on the ground that the vendors had misrepresented the assets sold. The defendants accepted the repudiation and resumed possession of the assets sold. The plaintiff applied to have them restrained from dealing with the assets in any way.

Held, that it was not a case for an injunction.

The court has no jurisdiction to prevent by interim injunction the defendant from dealing with his own property as he sees fit and in which the plaintiff has no interest or to which he makes no claim. Appeal dismissed with costs.

McCaul, K.C., for appellant. *Kappele*, for respondent.

Courts and Practice.

JUDICIAL APPOINTMENTS, ONTARIO.

His Honour Charles Wesley Colter, Judge of the County of Haldimand, to be Judge of the County Court of Elgin, in the room of His Honour D. J. Hughes, retired.

George B. Douglas, of the Town of Chatham, Barrister, to be Judge of the County Court of Haldimand, in the room of His Honour Judge Colter, transferred to the County of Elgin.

Flotsam and Jetsam.

The Judicial Committee of the Privy Council, consisting of Lord Macnaghten, Lord Davey, Lord Lindley, and Sir Arthur Wilson, resumed their sittings on Wednesday after the Easter Vacation. The list of business before them included twenty eight appeals—viz., from Bengal, seven; Newfoundland, four; Bombay, three; New South Wales, two; Oudh, two; New Zealand, two; and Madras, Lower Burma, Trinidad and Tobago, Canada, Western Australia, Cape of Good Hope, Sierra Leone, and the Straits settlements, one each. There were also two judgments for delivery in appeals heard before the vacation.—*Law Times*.

Having fined a young man for entering a train while in motion, Mr. Plowden embarked on a short piece of autobiography which will not be found in his recently published book. "I should be very sorry" he remarked "to say how often I have done the same thing myself." This recalls to a contemporary a story which is believed to refer to Mr. Marchant Williams. He had to try a man for exceeding twelve miles an hour on a motor-car, and on the day of trial he overslept himself. The court was twenty-five miles from his house. He hired a motor, started off, and reached the court well inside the hour, in excellent time to fine the twelve-mile-an-hour desperado five pounds.—*Law Times*.

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Hon. Mr. Justice Ferguson, of the Chancery Division of the High Court of Justice for Ontario, passed away on the 31st ult. His health had been failing for some time. He was an able, painstaking and conscientious Judge; and his loss will be much regretted.

We notice that the objectionable practice of appointing judges to do extra judicial work is being continued. We should have supposed that the Governments of the Dominion and Ontario would by this time have realized the damaging results that necessarily flow therefrom. But it would seem that the juggernaut of party politics still holds the right of way. Surely if it is necessary to ascertain why some United States engineers are employed on the Grand Trunk Pacific Railway, the information could be obtained without taking a judge from his proper duties on the bench, and accidentally running the risk of dragging the judiciary into politics.

We feel that we owe our professional readers no apology for our persistency in urging the political union of Newfoundland and Canada. What concerns the national welfare finds an instant recognition in the hearts of Canadian lawyers, than whom there is no more zealously loyal class of citizens in the Dominion. Since our last issue the consummation we so devoutly wished has been advanced a stage by the outspoken pronouncement in favor of confederation by Archbishop Howley, head of the Roman Catholic Church in the island. Archbishop Howley is a far-sighted and broad-minded Imperialist, and his words cannot but bear good fruit among the people of Newfoundland. But it will take a lot of sentiment to offset the present active pro-American policy of the Newfoundland legislature. The recent grant by that body of a virtual monopoly of the cold storage and fresh fish business to a subsidized American firm shows how indifferent the politicians here are to the commercial interests of Canada and British ascendancy in British America. Facts like this and the Bond-Blaine treaty, which Great Britain was short-sighted enough to promote, show us how urgent is the need for a vigorous agitation for Confederation being instituted by the people of this Dominion.

We return to the Alaska Boundary Commission merely to note that the carrying out of the settlement arrived at between Lord Alverstone and the United States Commissioners is, in some important respects, virtually impracticable. In the first place, as Mr. Dall, the United States expert, in describing the treaty's tortuous and zigzag course, says:—"Let any one, with a pair of drawing compasses, having one leg a pencil point, draw this boundary on the United States survey map of Alaska. The result is enough to condemn it. Such a line could not be surveyed on the land. It crosses itself in many places, and indulges in myriads of knots and triangles. It would be subject to insuperable difficulties, and the survey would cost more than the whole territory cost originally." In addition to this the Canadian engineers say that the cost to Canada for marking this boundary on the territory would be \$2,300,000. The United States engineers say that the cost to them would be \$2,250,000; moreover, that it would take some fifty years to do the work. This would certainly be a very valuable result, and a nice place it would be for fugitives from justice to play hide and seek in. There is, in addition the fact that, as to a portion of the boundary, no settlement whatever has been arrived at. There is, therefore, still a large field for diplomacy to cover. We venture to think, however, that Canada will not then need the services of the learned Chief Justice who, last October, ventured to play a lone hand in a game which his opponents *did* understand.

In a recent number of "*Revue de Droit International et de Législation Comparée*," M. Maxime Kovalewsky has a very interesting article on the Literature of the Social History of England in the Middle Ages and in the Epoch of the Renaissance. M. Kovalewsky finds in the historical literature of these periods fascinating material for the sociological student. He looks upon the Domesday Book (*c'est-à-dire*, "*livre du jugement*") of William the Conqueror, as a document unique of its kind, and of paramount use in tracing the origin of economic and social institutions in Europe. In this connection he also speaks of the value of the compilation of Anglo-Saxon laws, known as the laws of Edward the Confessor, and the legal works of Glanville, Bracton and Britton in the twelfth and thirteenth centuries. He alludes in terms

of praise to the learned labours of English archæologists and historians, such as Bishop Stubbs, Maine, Professor Thorold Rogers, Freeman, Green, and Professor Maitland, of Cambridge; nor does he overlook our latter-day Grotius, Sir Frederick Pollock. The entire article is pleasant reading to those of us who believe that the history of the development of jurisprudence and of political and social institutions in England is second only in interest and importance to that of Imperial Rome.

Prof. Münsterberg, of Harvard University, has told the Americans some very homely truths about their national shortcomings during his sojourn among them, and his latest deliverance, namely, that the Monroe Doctrine is obsolete, or soon will be, because its *raison d'être* has passed away, is calculated to give some of their Chauvinists ample food for reflection. We have all along entertained the view that compelling Imperialism to masquerade as Monroe Doctrine up-to-date needed a Gilbertian hand to do it full justice.

We are glad to see that the country, as a whole, is waking up to the inadequacy of the scale of salaries paid to the judiciary of Canada. Some time ago an able plea for justice to the judges was advanced by the organ of the Canadian hardware trade; and it has been quoted with approval by several of the most influential newspapers in the Dominion. One of these in a forcible article quotes the late Senator Dickie's speech in the Senate, in 1891, and observes: What Senator Dickie said then with so much force gains additional strength when quoted after thirteen years of inaction in the matter. It is not becoming to the dignity of Canada that it should be said of her that her judiciary is the poorest paid of any in the chief British possessions. It is the smallest sort of cant for us to laud the probity of our judges on the one hand, and to deny them salaries commensurate with their work and dignity on the other. It is an old saying that a well-paid bench makes justice cheap. An unsound judge is dear at any price; and it is no answer to say that he can be put right on appeal. That means additional expense and delay to the well-to-do suitor; to the poor man it means that the majority of instances enforced acquiescence in a denial of

justice. The better the judges the fewer the appeals. By all means, then, let us make it possible for our best lawyers to go on the bench without facing one of the hardest of all trials—poverty in high position.”

So far as we have looked into the matter the statement that we pay our judges less than is paid in any other of the chief British possessions is quite correct. A much higher scale prevails in the Commonwealth of Australia, as well as New Zealand and South Africa, not to mention India, where we would naturally expect to find more generous salaries, on account of climate and unique political conditions. True, in Newfoundland, the scale is pretty much the same, but in Jamaica, on the other hand, the remuneration is relatively more liberal than in Canada. We believe that the time is near at hand when parliament will relieve the country of this cause of reproach.

The reason for an increase in judicial salaries is obvious. The cost of living is vastly greater now than it was, and the value of money is proportionately less. Salaries and wages, with the exception of judges' salaries and solicitors' fees, have all been largely increased during the past twenty years. The present tariff of fees for solicitors, at least in the Province of Ontario, is simply ridiculous. When judges claim that their salaries ought to be increased, it does not seem to occur to them as vividly as it might, that the same reason for such increase applies also to solicitors. It would be quite in order for them to come to the relief of those who have loyally supported them in the premises, by revising the present tariff. “Do as you would be done by,” is an appropriate exhortation on this occasion. Another matter connected with this subject is the disproportion between the remuneration to High Court judges and their brethren of the Court of Appeal. The latter should, on principle, be entitled to more than the former, but in fact they receive less. It might be desirable and, perhaps, it would be good policy, at the present time, to continue the crusade on behalf of appellate judges only. A step gained in that direction would eventually be helpful to the others.

We have before us the judgment of Mr. Justice Townshend, in the Nova Scotia Cases, *McDonald and others v. Warwick Gold Mining Co.* (post p. 399). Some of the claims in these cases were for work and labor, and others for goods sold and delivered. Applications were made for summary judgment under Nova Scotia Order XIV., which corresponds with the English Order XIV., in its latest amended form. We may remark also, that Nova Scotia Order III., Rule 5, corresponds with English Order III., Rule 6. The learned judge, in his judgment, remarks: "What constitutes a liquidated demand, which may be specially endorsed, has been the subject of much controversy in England, Ireland and Ontario, but as far as I am aware, it is raised for the first time here." We notice that the judge follows the line of reasoning taken in what he describes as the "very full discussion of the point" to be found in 39 C.L.J. pp. 49 and 545, by Mr. Alexander MacGregor." In view, however, of the subject being new he gave leave to the parties to bring the matter before the full court.

APPEALS TO THE KING IN COUNCIL.

We have received from Mr. Donald MacMaster, K.C., Batonnier of the Montreal section of the bar of Quebec, a memorandum recently sent by him to his Council, calling attention to some anomalies and encumbrances in connection with the bringing of appeals to the King through the Judicial Committee of the Privy Council.

As our readers are aware, appeals from colonial possessions go to the Judicial Committee—that is to say to the King in Council, and appeals from the courts of the British Isles to the House of Lords—that is to the King in parliament. There are many who think that there should be but one general court of Appeal for the Empire, whilst others, favor the view that there should be no appeal beyond our own Supreme Court, except in constitutional matters. Whilst this is not our opinion, we recognize that the present condition of things, connected with appeals to England, strengthens the hands of the latter class.

Mr. MacMaster, in calling attention to the present practice, says, that it is usual to engage a firm of English solicitors, so

that there are usually three sets of legal gentlemen engaged in connection with these appeals, (1) the Canadian counsel; (2) the English solicitors, and (3) the English counsel. This, of course, entails considerable expense, and the suggestion is that this expense ought to be and can be considerably reduced. His proposition is "that under the rules covering the procedure in the Privy Council, an agent might be appointed to represent the party appealing, and another to represent the respondent, and that these agents might be two of the clerks in connection with the Canadian High Commissioner's office, in London. Their main function would be to file the record and the cases or *factums* of the parties, to receive notice from the Privy Council office when the case is coming on for hearing, to give notice to the respective principals, to arrange for consultation between the counsel, and to report the result of the hearing." This course would do away with the very unnecessary charge resulting from the employment of English solicitors to do merely routine work. He also calls attention to the absurd charge made by the English solicitors for "perusing the record." This item is a relic of a previous state of things when the record was prepared in England. Now it is almost universally prepared and printed in this country.

The other matter referred to by Mr. MacMaster is the antiquated and embarrassing procedure in connection with compelling a party to appear and file his case. Should it be necessary to serve papers in procedure of this kind, notices are to be posted or affixed in two conspicuous places in the city, namely, the Royal Exchange or Lloyd's Coffee House. We learn "that this quaint old custom dates back to the times when captains of outward bound ships used to meet and make a note of these summonses." Members of the legal profession are apt to be somewhat conservative, but this is rather too much of a good thing; and so Mr. MacMaster suggests that the office of the High Commissioner or agent of the colony from which the appeal comes would be a much more appropriate place for posting notices. It seems odd, as he remarks, that in these days of progress the utter uselessness and absurdity of this procedure never seems to have occurred to those in authority. We have no doubt that this remonstrance of Mr. MacMaster will cause some emendation of the practice. We trust it may.

EVIDENCE OF ACCUSED PERSONS.

A statutory rule prohibiting comment by the prosecuting counsel upon the failure of the accused, either to testify on his own behalf, or to call his wife as a witness in a criminal case, is contained in the Canada Evidence Act, 1893, s. 4. This was viewed as prohibitive, and not as directory only, in the Nova Scotia case of *The Queen v. Corby* (1898) 1 Can. Cr. Cas. 457, and an infraction resulted in a conviction being set aside and a new trial ordered. The same doctrine was applied in the more recent decisions of *The King v. Hill* (1903) 7 Can. Crim. Cas. 38, by the Supreme Court of Nova Scotia, although the prisoner's counsel was the first to comment on the absence of the prisoner's wife as a witness. The prisoner's counsel had there suggested in his address to the jury an explanation of the failure to have the wife present as a witness at the trial, and the prosecuting counsel was thus led to commenting in answer. The court granted a new trial, holding that the section specified is an absolute mandate.

The same rule is contained in the Criminal Evidence Act, 1898 (Imp.), and that Act is also silent as to what is to be the result should the prosecution disregard the prohibition. But it is interesting to note that in Scotland a different interpretation is given to it from that which obtains here.

The *Law Times* (England), in a recent issue says: "The learned editor of the last edition of Best on Evidence expresses the opinion (at p. 521) that any comment by the prosecution on an accused person's failure to go into the box would be sufficient to vitiate the proceedings and render voidable any conviction obtained. As appears from two decisions, reported in the last issued part of the Session Cases, the judges of the High Court of Judiciary are not disposed to take so serious a view of the consequences of disobedience to the statutory injunction. In each of the two cases in question it was sought to set aside a conviction on the allegation that the prosecutor had commented upon the fact that the accused had not given evidence on his own behalf, but in each case the judges, while stating that the statutory direction ought to be scrupulously observed, nevertheless thought that the mere fact of its transgression was not enough to entitle the accused to acquittal, and they accordingly refused to quash the convictions: *Ross v. Boyd*, F. (J.C.) 64; *M'Attee v. Hogg*, 5 F. (J.C.) 67. Both appellants

cited the case of *Charnock v. Merchant*, 82 L.T. Rep. 89 ; (1900) 1 Q.B. 474, where a conviction was set aside because the prosecutor, in disobedience to another direction of the statute, asked an accused who had tendered himself as a witness whether he had been previously convicted, which question the accused answered in the affirmative. The court, however, regarded this case as distinguishable, inasmuch as the prosecutor's disregard of the statute had there resulted in the admission of incompetent evidence, which was a different matter from the making of incompetent or improper observations. The result seems to be that the statutory direction that no comment is to be made on the accused's failure to give evidence stands, in Scotland at least, as a bare injunction and nothing more." It occurs to us, however, that the statute is more than a mere exhortation, and the better view, it seems to us, is the one propounded in the Nova Scotia cases above referred to.

North Carolina attorneys, if the press is to be believed, have figured out a pretty good way of getting even with an unpopular judge. It would seem that this specimen of the genus *judex* has made a point of conducting himself with such marked discourtesy to counsel that the lawyers of that particular county recently entered into a most solemn compact between themselves to refrain from appearing in his court. Wherefore, when his Honor opened court a short time ago he found nineteen cases on the trial docket, but not a member of the bar present. It is said that he has contempt proceedings in contemplation, but the lawyers of the county seem disposed to regard his threats with levity. Boycotting an unpopular member of the judiciary appears to be a rather novel proceeding, but in view of the calibre of some of the specimens which, unfortunately, acquire a position on the bench, this remedy would seem to be occasionally needed. It is to be hoped that it will work well in the present instance.—*American Lawyer*.

ENGLISH CASES.

**EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.**

(Registered in accordance with the Copyright Act.)

**LANDLORD AND TENANT—RESTRICTIVE COVENANT—COVENANT BY LANDLORD
WITH LESSEE "NOT TO LET" ADJOINING PREMISES FOR SIMILAR BUSINESS TO
THAT OF COVENANTEE—BREACH OF COVENANT—INJUNCTION—DAMAGES**

In *Brigg v. Thornton* (1904) 1 Ch. 386, the plaintiff leased certain premises in an arcade from the defendant Thornton for the business of a fine art dealer, and Thornton covenanted with the plaintiff not to let any of the other shops in the arcade for carrying on any similar business. Thornton subsequently let a shop to one Grant for the purpose of carrying on a bookselling and stationery business, and in carrying on such a business Grant sold certain articles commonly sold in such a business, but which were also usually included in the plaintiff's business. The plaintiff claimed an injunction restraining Thornton from letting the shop to Grant or any other shop in the arcade, and Grant from using the shop, or any other shop in the arcade, for any of the purposes described in the plaintiff's agreement. The Vice-Chancellor of the Palatine Court granted an injunction as prayed. On appeal, however, the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), varied his judgment. Although they conceded that the plaintiff might have framed his case to set aside the lease to Grant as a breach of the covenant, yet they found that he had not done so, his claim being to restrain Thornton from letting or allowing to remain let, and Grant from using the premises for the purpose of carrying on a similar business to that of the plaintiff and the Court of Appeal found that as the plaintiff had elected as against Grant to treat the lease to him as a subsisting lease, the only remedy they were entitled to was damages against Thornton for breach of contract, with costs, and they dismissed the action as against Grant with costs.

WILL—CONSTRUCTION—PRECATORY TRUST—ABSOLUTE GIFT “IN CONFIDENCE” THAT DONEE WILL MAKE A CERTAIN DISPOSITION—GIFT OVER IN DEFAULT OF DISPOSITION BY ABSOLUTE DONEE.

In re Hanbury, Hanbury v. Fisher (1904) 1 Ch. 415, was the case of a “home-made” will. By it the testator bequeathed and devised all his estate to his wife “absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or ~~more~~ of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property ~~acquired~~ by her under this my will, shall, at her death, be equally divided among the surviving said nieces.” The testator left his wife and seven nieces surviving. An originating summons was obtained by the widow for the purpose of getting a construction of the will. She claimed that the will gave her an absolute right to the property, and the expression of the testator’s ‘confidence’ that she would make a certain disposition of it did not impose any trust or limit her absolute right to the property. Kekewich, J. agreed with this, and held the widow solely and absolutely entitled, and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed his decision. Cozens-Hardy, L.J., however, dissented and considered that the widow only took a life estate, but that if all the nieces predeceased her, her estate would become absolute, and that in case they survived her they would be entitled in such shares as the widow might appoint, and in default of appointment in equal shares.

WILL—CONSTRUCTION—FORFEITURE CLAUSE—WHETHER FORFEITURE CAN BE INCURRED BEFORE DEATH OF TESTATOR.

In re Chapman, Perkins v. Chapman (1904) 1 Ch. 431. A testator, by his will, provided that “if any son or daughter shall” alienate his interest, or “shall contract any marriage forbidden by me” then “his or her share shall thenceforth cease and determine.” The testator declared that the marriages forbidden by him were marriages with a person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter’s marriage, contracted without the previous consent of the trustees of his will. By *Metcalfe v. Metcalfe* (1891) 3 Ch. 1 (noted ante vol. 27, p. 550), it was laid down that a forfeiture clause of a will providing

that in the event of alienation by, or bankruptcy of, a legatee his interest shall cease and determine, applied to acts committed after the date of the will, but before the testator's death; and the question was whether that rule applies generally to all forfeiture clauses, including such as that in the present case of marrying within forbidden degrees; one of the daughters of the testator having married, during the lifetime of the testator, her first cousin. Kekewich, J., came to the conclusion that it did apply; but the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), determined that it did not, and that the will in question, on its face, shewed that the acts of forfeiture in the testator's contemplation, were acts occurring after his death and, therefore, as to marriage within the forbidden degrees, the clause must be held to apply only to such marriages contracted after his death; the reason why a different rule applies to forfeitures in case of alienation or bankruptcy is, as Lindley, L.J., explained in *Metcalfe v. Metcalfe*, supra, in order to give effect to the obvious intention of the testator to secure the personal enjoyment by the legatee of the property left to him by the will.

SETTLEMENT — COVENANT TO SETTLE AFTER ACQUIRED PROPERTY — CONSTRUCTION — ANNUITY.

In re Dowding, Gregory v. Dowding (1904) 1 Ch. 441, involved the question whether a general covenant to settle after acquired property, whether in possession of covenantor or otherwise, affected an annuity for life acquired by the covenantor during coverture. Kekewich, J., held that unless there was something in the covenant expressly making it applicable to such an interest it would not be caught by the covenant. As he points out, if the contrary were the case it would have the effect of necessitating the conversion of each instalment of the annuity into capital so that only the interest thereon alone would have been payable to the cestuis que trust of the settlement, a result which could not be deemed to have been the intention of the parties.

SEPARATION DEED SETTLEMENT BY SEPARATION DEED ON CHILDREN OF MARRIAGE — RESUMPTION OF CO-HABITATION.

In re Spark, Spark v. Massey (1904), 1 Ch. 451, shews that the general rule that a separation between husband and wife is put an end to by the parties subsequently resuming co-habi-

tation is subject to an exception in favour of children taking an interest under the deed. In this case a separation deed had been made and thereby the husband had assigned property to trustees for his wife for life, and after death, for the benefit of the existing children of the marriage. The parties afterwards resumed cohabitation, and Kekewich, J., held that the settlement in favour of the children was not affected thereby.

HUSBAND AND WIFE—MARRIAGE—EVIDENCE OF MARRIAGE—PRESUMPTION FROM CO-HABITATION.

In re Shepherd, George v. Thyer (1904) 1 Ch. 456. A summary application to determine the question of legitimacy. The parties in question were the children of an English man and woman who, in 1873, left England for France, with the intention of getting married. They landed in France, travelled some distance on the railway and then went through a form of marriage. Neither of them could recollect the name of the town where they landed, or the place where the alleged marriage took place, and neither of them knew the French language. The marriage was arranged by a lady, who took them to the place where they were married, and witnessed the marriage, but she had been dead many years. The ceremony was performed in French. The alleged wife said that she did not sign any document but put on a ring. They returned to England and ever since three weeks after their return, in 1873, had lived together as man and wife, and had issue nine children, of whom six were living, whose legitimacy was in question. On this state of facts Kekewich, J., held that even assuming that the alleged marriage was impossible, according to French law and the habits of law abiding people in France, yet that was not sufficient to rebut the legal presumption in favour of their having been a valid marriage arising from the long-continued co-habitation of the parties as man and wife and, therefore, gave judgment in favour of the legitimacy of the children.

VENDOR AND PURCHASER—VENDOR RECEIVING RENTS AFTER DATE FOR COMPLETION—APPROPRIATION OF PAYMENTS—ARREARS OF RENT DUE BEFORE DATE FIXED FOR COMPLETION, BUT PAID AFTERWARDS.

In *Plews v. Samuel* (1904) 1 Ch. 464, Kekewich, J., decided that where a vendor continued in possession of the property sold after the day fixed for completion, and received rents, he was not

entitled as against the purchaser to appropriate such payment to arrears, if any, due before the date of the contract.

HUSBAND AND WIFE—POST NUPTIAL SETTLEMENT—TRUST FOR WIFE DURING CO-HABITATION—PUBLIC POLICY.

In re Hope Johnstone, Hope Johnstone v. Hope Johnstone (1904) 1 Ch. 470. Kekewich, J., held that a trust in a post nuptial settlement, made by a husband in favour of his wife for life "or so long as she shall continue the co-habiting wife or widow" of the settlor, was valid and effectual and not contrary to public policy, and that on the husband and wife ceasing to co-habit the trust in her favour ceased.

PARTNERSHIP—ARTICLES OF PARTNERSHIP—EXPULSION OF PARTNER—BREACH OF DUTY AS PARTNER—CONVICTION OF PARTNER FOR FRAUD—INTERIM INJUNCTION TO RESTRAIN EXPULSION OF PARTNER.

Carmichael v. Evans (1904) 1 Ch. 486, was an action by a partner for an injunction to restrain his co-partner from expelling him as a partner. The articles provided that if either of the junior partners became "addicted to scandalous conduct detrimental to the partnership business," or should be guilty of "any flagrant breach of the duties of a partner" the senior partner might expel the offender on giving him six days' notice. The plaintiff, one of the junior partners, had been convicted by a police magistrate for travelling without a ticket, and fined, and was thereupon served with notice of expulsion, and now applied for an interim injunction to restrain his expulsion. Byrne, J., refused the motion on the ground that as the fact of the plaintiff having been convicted of dishonesty was not denied, the notice of expulsion was justified.

 REPORTS AND NOTES OF CASES.

 Dominion of Canada.

 SUPREME COURT.

Ex. C.]

MCARTHUR v. THE KING.

[April 27.]

Public works—Lands injuriously affected—Closing highway—Inconvenient substitute.

The owner of land is not entitled to compensation where by construction of a public work he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated as it arises from the subsequent use of the work and not its construction and is an inconvenience to the public generally.

The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment mere inconvenience to an individual or loss of trade or business is not the subject of compensation.

Judgment of the Exchequer Court, 8 Ex. C.R. 245; 39 C.L.J., 445, reversed. Appeal allowed with costs.

Chrysler, K.C., for appellant. MacLennan, K.C., and MacLennan, for respondent.

Ont.] MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO. [April 27.]

Shipping—Time limit for loading—Loading at port—Custom—Obligation of charterer.

A ship, by the terms of the charter, was to load grain at Fort William before noon, Dec. 5.

Held, affirming the judgment of the Court of Appeal (6 O.L.R. 432, 39 C.L.J., 782), GIROUARD and NESBITT, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed and left to save insurance, the obligation was not fulfilled and the owner could not recover damages. Appeal dismissed with costs.

Borden, K.C., and Hodgins, K.C., for appellants. Aylesworth, K.C., and Moir, for respondents.

Reports and Notes of Cases.

Ont.] **WATER COMMISSIONERS OF LONDON v. SAUNDERS.**
Water commission—Act of incorporation—Construction—Appropriation of water—Power.

The Act for construction of waterworks in the City of London empowered the commissioners to enter upon any lands in the 15 miles thereof and set out the portion required for the purpose of diverting and appropriating any river, pond, spring or stream therein.

Held, (SEDGEWICK and KILLAM, JJ., dissenting) that the Act appropriated was not confined to the area of the lands entered upon by the commissioners could appropriate the water of the River Thames by the erection of a dam and setting aside of a reservoir; and that the water could be used to create power for utilization of other waterworks not necessarily to be distributed in the city for drinking and other purposes. Appeal allowed with costs.

Aylesworth, K.C., and *Meredith*, K.C., for appellant.
K.C., and *Joy*, for respondents.

N.B.] **MILLER v. ROBERTSON.**

Court of Equity—Title to land—Declaratory decree—Claim of title—Adverse possession—New grounds of appeal.

A Court of Equity will not grant a decree confirming title claimed by possession under the Statute of Limitations nor will it enjoin a person from selling land of another.

Per TASCHEREAU, C.J.—Where leave to appeal per se is granted on the ground that the court of last resort in the matter has already decided the question in issue the appellant should advance new grounds to support his appeal. Appeal allowed.

Gormully, K.C., and *Fred. Taylor*, for appellant.
W. B. B. respondent.

N.B.] **MADDISON v. EMMERSON.**

Crown lands—Adverse possession—Grant during

Though there has been adverse possession of Crown land for more than twenty years, the Act 21 Jac. 1, c. 14, does not prevent the Crown from validly granting the same without first re-establishing title by possession. *DAVIES*, J., dissenting.

Judgment appealed from (36 N.B. Rep. 260) reversed.

Powell, K.C., for appellant. *Pugsley*, K.C., and *Friedman*, K.C., for respondent.

Ont.]

OTTAWA DAIRY CO. v. SORLEY.

[April 27.]

*Joint Stock Company—Subscription for shares—Principal and agent—
Authority of agent—Conditional agreement.*

S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company to which they were transferred after incorporation. In an action for payment of calls S. swore that the stock was to be given to him in part payment for the goodwill of his business which the company was to take over. The promoter testified that the shares subscribed for were to be an addition to those to be received for the goodwill.

Held, that though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority and whichever of the two statements at the trial was true the promoter could not bind S. by an unconditional application. Appeal dismissed with costs.

McVeity, for appellants. *Fraser*, K.C., and *Burbidge*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.]

[Jan. 25-26.]

PUTERBAUGH v. GOLD MEDAL FURNITURE COMPANY.

*Libel and slander—Publication—Privilege—Dictating letter to
stenographer.*

Appeal from judgment of Divisional Court, reported 5 O.L.R. 680., allowed on the ground that as to publication and privilege this case cannot be distinguished favourably to the defendants from that of *Pullman v. Hill*, [1891] 1 Q. B. 524, the Court not being at liberty to refuse to follow that case unless it could see that it is opposed in principle to other authority binding upon the Court,—subject, however, to the plaintiff consenting to reduce the damages to \$50. Otherwise the order for a new trial to stand on the ground of excessive damages, and the appeal to be dismissed with costs.

DuVernet, for plaintiff, appellant. *F. C. Cook*, for defendants, respondents.

From MacLennan, J.A.] *CENTAUR CYCLE CO. v. HILL.* [Feb. 29.
*Court of appeal—Security—Money paid into Court—Payment out after
 purpose answered—Further appeal.*

A party who has paid money into Court as security upon his appeal to the Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to the Supreme Court of Canada or the Judicial Committee of the Privy Council. An appeal to the Court of Appeal is a step in the cause, but a further appeal is not so.

Order of MACLENNAN, J.A., affirmed.

C. W. Kerr, for defendant Hill. Middleton, for plaintiffs.

From Boyd, C.] *HIGHWAY ADVERTISING CO. v. ELLIS.* [April 18.
Company—Promoter—Fiduciary capacity—Profit—Action to recover.

The defendant Hotchkiss was the owner of a patent for certain improvements for advertising boards, and in April, 1898, induced the other defendants to take an interest in it with him with a view to introducing the patented article into public use, and it was agreed between them that each should have a joint interest in the patent and jointly endeavor to make it a successful undertaking. They then decided to form a company. Hotchkiss had not at this time actually assigned to the other defendants any interest in the patent, but he did this in June, 1898, pending the issue of the letters of incorporation, the expense of which the other defendants at the same time undertook to bear: and by agreement of even date the defendants agreed with one Maughan, to sell to the company when incorporated the patent and all improvements, in consideration of the company paying them \$5,000 and crediting \$45,000 in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company an instrument was executed by the defendants and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the plaintiffs. The plaintiffs now sought to recover the \$5,000 on the ground that the defendants when they made the agreement of June, 1898, to transfer to the plaintiffs, had become holders of the patent for the benefit of the plaintiffs, and were disentitled to any profit on the transaction.

Held, that the action must fail inasmuch as the defendants did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards and before incorporation actually transferred to them.

Semble, that even if the defendants had acquired their interests without consideration that would be of no consequence to the plaintiffs unless acquired for them.

Aylesworth, K. C., and J. M. McEvoy, for plaintiffs, appellants.
 Shepley, K. C., and W. H. Irving, for defendant Ellis, Heighington, for defendant McCutcheon.

From Divisional Court]

HOPE v. PARROTT.

[April 18.

Bills of sale and chattel mortgages—Security of form in absolute sale—Non-compliance with Chattel Mortgage Act—Invalidity.

In case of a transaction which is in effect one giving a security for an existing debt or loan, the lender or grantor cannot evade compliance with the sections of the Bills of Sale and Chattel Mortgage Act, R. S. O. 148, which relate to such a transaction, merely by adopting a form of security appropriate to an absolute sale. If, however, the real transaction is a sale with a right of repurchasing upon certain terms, the vendor can only be required to observe the requirements of section 6 of that act.

Held, therefore, in this case that since what purported to be Bills of Sale of certain goods were given in fact as transfers for security only, as was established by the facts of the case, as for example, by the fact that the consideration named had no relation to the selling price of the chattels, and that the chattels were intended to remain and did remain in the possession of the grantors, and were used by them without any rent or hire paid or agreed to be paid therefor, and the grantee admitted that from the first he expected to be repaid the consideration money, although he denied, apparently erroneously, that any right of redemption was reserved to the grantors at the time or as part of the transaction, the instruments were within ss. 2 and 3 of the said Act, and since the requirements of the said Act with regard to Chattel Mortgages had not been complied with, they were invalid.

Shepley, K. C., for defendant, appellant. *Masten*, for plaintiffs, respondents.

From Britton, J.]

BRIDGMAN v. ROBINSON.

[April 18.

Vendor and purchaser—Conditional sale—Resumption of possession—Implied contract.

Certain goods were delivered to the plaintiff by the vendor on the terms of two conditional sale agreements. The total price was \$600, to be paid part in 30 days after delivery, and the balance in 3 months with interest. It was agreed that until payment in full the goods were to remain the property of the vendors, and that on default for one month of any of the payments, or of any extended payment, the whole balance of the purchase money should become due and the company, notwithstanding action or judgment recovered therefor, might resume possession and resell, etc. The plaintiff got into default although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay \$50 on account, and the balance of \$242, made up of arrears of principal and interest, in quarterly instalments of \$30 with interest. The plaintiff paid the \$50. In October, 1902, the defendant who had a judgment against the plaintiff paid the vendors the whole balance

issuing of a patent, has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing'; and it made no difference that the defendants had done what they did without the consent and allowance of the inventor.

E. Bayly and Eric Armour, for defendants, appellants. *J.W. Nesbitt*, K.C., for plaintiffs, respondents.

From Meredith, J.] *PATCHELL v. RAIKES.* [April 18.
Municipal corporations—Bonus—Interest—Illegal payment—Liability of
councillors—Arbitration and award.

In the year 1899 by special Act an agreement between the corporation of a town and a company was confirmed, by which, on completion of certain works, the company was to be paid a bonus. The works were proceeded with but alterations became necessary and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorizing the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of interest on the amount from the date of completion of the works. After some negotiation the town and the company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts advised the payment of the claim, and payment was made in spite of the protest of the plaintiff.

Held, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion which was no protection and that the councillors who had authorized the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment.

Semble, the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law.

Judgment of MEREDITH, J., reversed.

Kappele, for appellant. *Finlayson*, for respondents.

From Falconbridge, C.J.K.B.] [April 18.

CANADA COMPANY v. TOWN OF MITCHELL.

Assessment and taxes—Local improvements—General by-law.

The defendant corporation provided by a by-law under section 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council

whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under section 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and, subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected.

Held, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection.

Judgment of FALCONBRIDGE, C. J., affirmed.

G. G. McPherson, K. C., for the appellants. F. H. Thompson, for the respondents.

Osler, J. A.]

ROSS v. ROBERTSON.

[April 20.]

Appeal—Notice—Extending time.

Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted.

In considering what justice requires in such a case regard is to be had to the bona fides of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous.

Where therefore a bona fide intention to appeal had been made out, the points raised were open to argument, and the delay was very short, notwithstanding the court having been lost, leave to serve notice of appeal was given.

C. A. Moss, for applicant. Slight, for defendant.

HIGH COURT OF JUSTICE.

Street, J.]

ROSS v. ROBERTSON.

[Feb. 1.

Limitation of actions—Account—Co-owners of land—Partnership—Principal and agent—Trustee—Outlay on land—Rents.

The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on August 5, 1902.

Held, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and defendant were not partners, nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character. *Coyne v. Broddy*, 15 A.R. 159; *Burdick v. Garratt*, L.R. 5 Ch. 233, and *Lyell v. Kennedy*, 14 App. Cas. 437, distinguished.

J. H. Moss, for plaintiff. *H. L. Drayton*, for defendant.

Street, J.]

KNAPP v. CARLEY.

[Feb. 6.

Master in Chambers, jurisdiction—Summary dismissal of action.

The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground that no cause of action is shewn upon the plaintiff's own statement.

Grayson Smith, for plaintiff. *C. A. Moss*, for defendant.

Britton, J.]

LANE v. CITY OF TORONTO.

[Feb. 25.

Municipal corporations—Inquiry into municipal election—Powers of Council—Municipal Act, 1903, s. 324 (1)—“Good government of the municipality”—Ratepayer—Injunction—Conduct of inquiry—Evidence—Witnesses—Ballot papers.

Held, that the council of a city had power under s. 323 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the council and Board of Education, at which it was alleged that corrupt practices had prevailed; the election being a

"matter connected with the good government of the municipality," within the meaning of the enactment.

Held, also, that the High Court would not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry by the judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc.

Dewart, K.C., for plaintiff. *Fullerton*, K.C., for defendant corporation. *Riddell*, K.C., for defendant Winchester.

Falconbridge, C.J.K.B., Street, J., Teetzel, J.] [Feb. 29.

ONTARIO WIND ENGINE AND PUMP CO. v. LOCKIE.

Conversion—Goods obtained by fraud—Sale to innocent purchaser—Title—“Agent”—“Intrusted with the possession”—R.S.O., c. 150.

One McK., who was in the habit of taking orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK., and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory note for the price, both purporting to be signed by the defendant, whose signature was forged by McK.

Held, in an action for conversion of the machine, that McK. never had any title thereto, and, therefore, at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an agent of the plaintiff, or "intrusted with the possession" of the machine, within the meaning of R.S.O. 1897, c. 159, and therefore the plaintiffs were entitled to succeed. Judgment of the County Court of Waterloo reversed.

Card and Spence, for plaintiffs. *Du Vernet*, for defendant.

Boyd, C.] IN RE BETHUNE. [March 2.

Will—Construction—Bequest to widow—Use during lifetime—Power to dispose of moiety by will.

The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations."

Held, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety.

Middleton, for the widow. *Raymond*, for the executors.

Britton, J.] IN RE HASKILL AND G.T.R.W. Co. [March 28.

Railway—Expropriation of land—Notice—Withdrawal after taking possession—New notice for same land—Invalidity—Increase in compensation money—Arbitrator—Costs.

A railway company having given notice of requiring certain land for their railway and having taken possession of it, cannot abandon their notice and give a new notice for the same land. *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Therese*, 15 S.C.R. 606, applied.

Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator ;

Held, upon a motion by the landowner to compel the company to proceed with the arbitration that although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of a new arbitrator should be confirmed (the landowner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs.

W. F. Kerr, for landowner. *D. L. McCarthy*, for railway company.

Boyd, C.] IN RE ARCHER. [April 4.

Will—Construction—Gift to a class—Ascertainment of persons entitled.

A testator bequeathed the sum of \$500, as to income to be applied for the support of the testator's grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years.

Held, that the members of the class entitled to share were to be ascertained at the time when the eldest of the class attained the age of twenty-one years and that those grandchildren born after the death of the testatrix and before that time were entitled to share.

M. D. Fraser, and *F. P. Betts*, for various parties.

Idington, J.] DOYLE v. DIAMOND FLINT GLASS CO. [April 19.

Executor and administrator—Lord Campbell's Act—Action before administration.

An action was brought to recover damages because of the death of a workman, the plaintiff alleging that she was his widow. Her status was put in issue and she obtained letters of administration as the deceased's widow and by amendment claimed also as administratrix :

Held, that having failed to prove her status as widow she could not succeed as administratrix, the rule that letters of administration relate back

to the time of the bringing of the action not applying where the person getting them up was not really entitled to obtain them. *Trice v. Robinson* (1888) 16 O.R. 433, distinguished.

Clute, K.C., for plaintiff. *Shepley*, K.C., and *R. H. Green*, for defendants.

[Anglin, J.]

IN RE ZIMMERMAN.

[April 20.

Dower—Equitable charge—Legacies—Mortgage.

A testator devised a farm to his son subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seized of the farm and the mortgage was then in force:

Held, that the son took under the will the legal seisin in the farm and not a mere equitable estate and that his widow was entitled to dower out of the full value of the land.

McLaughlin, K.C., for the widow. *Harcourt*, for the infants.

[Teetzel, J.]

IN RE CHAMPAGNE ST. JEAN v. SIMARD.

[April 21.

Executor and administrator—Costs of unsuccessful action—Personal estate exhausted—Right to resort to real estate.

An executor without direct authority or obtaining indemnity brought an action to recover a sum of money alleged to belong to the testator, and his action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party.

Held, that though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devise real estate.

Chrysler, K.C., for applicant. *G. F. Henderson* and *J. M. Hall*, for adult defendants. *Bethune*, for infant defendants.

[Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[May 5.

REX v. POLLAKOFF.

Profanation of the Lord's Day, C.S.U.C., c. 104, s. 1 and 13—Canada Evidence Act, 56 Vict., c. 31, s. 3—General and special act—Implied repeal.

The defendant had been convicted before R. E. Kingsford, one of the Police Magistrates in and for the City of Toronto, for exercising his ordinary calling on Sunday.

On the hearing the informant was called and sworn as a witness for the prosecution. C.S.U.C. c. 104, s. 13, enacts by its closing paragraph "that the party who makes the charge in writing before the justice shall not be admitted as a witness in the case." 56 Vict. (Dom.) c. 31, s. 3, enacts "that a person shall not be incompetent to give evidence by reason of interest or crime."

Held, sanctioning the principle of *Arscott v. Lilley*, 14 A.R. 283, and applying the doctrine, *generalia specialebus non derogant*, that the latter fact did not operate to repeal the former in this respect.

Chisholm, for the prosecutor. *J. E. Jones*, for the defendant.

Anglin, J.]

SMITH v. CLARKSON.

[May 5]

Staying proceedings—Vexatious action—Security for costs.

A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were after notice to the plaintiffs passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation.

Held, on the evidence, that there were grave doubts as to the bona fides of the action; that an order to stay proceedings would be justified but that in the exercise of discretion the action might be proceeded with upon security for costs being given.

Middleton, for defendant. *F. E. Hodgins*, K.C., for plaintiff.

Meredith, C.J., MacMahon, J., Teetzel, J.]

[May 5]

REX. v. BIDGOOD.

Liquor License Act, R.S.O. c. 246, ss. 49, 97, 99—Jurisdiction of Police Magistrate—Evidence in writing—R.S.O. c. 87, ss. 18 and 30.

The defendant had been convicted before D. M. Brodie (alleging himself in the conviction to be Police Magistrate in and for the Town of Sudbury, but having his appointment for the District of Nipissing), for selling liquor without a license. R.S.O. c. 246, s. 97, requires that the offence of selling liquor without a license should be heard and determined by two justices, while s. 99 provides for the evidence being taken down in writing. Sec. 18, R.S.O. c. 87, authorizes the appointment of a Police Magistrate for a District, and s. 30 declares that "a Police Magistrate

acting as such shall have power to do alone whatever is authorized by any statute in force in this Province relating to matters within the legislative authority of the Legislature of the Province, to be done by two or more Justices of the Peace, and every such Police Magistrate shall have such power while acting anywhere within the county for which he is ex officio a Justice of the Peace." The evidence in the case had been taken in short-hand, and the notes afterwards extended.

Held, 1. The first part of s. 30 applies to every Police Magistrate, but under the last part only a Police Magistrate for a county might have acted elsewhere than at the place for which he was appointed.

2. The conviction should be amended by giving the Magistrates proper style of office.

3. The provisions of s. 99 are directory.

Reg v. Scott, 20 O.R. 646, followed.

W. N. Ferguson, for the defendant. *Cartwright*, K.C., for the Magistrate.

Feetzel, J.]

REX v. WALTERHOUSE.

[May 20

Habeas Corpus—Crim. code ss. 144 and 263—Assault on a constable—*Erroneous description of offence.*

The prisoner had been convicted on an information charging him with an assault upon a constable whilst on duty.

Held, that whether jurisdiction was enjoyed by Justices of the Peace to convict summarily under s. 144 or not, the expression "on duty" was not equivalent to "acting in the execution of his duty," which are the words of the section, and the prisoner was ordered to be discharged.

Bradford, for the prisoner. *Cartwright*, K.C., for the Crown.

Cartwright—Master in Chambers.]

[April 25.

REX EX REL. SEYMOUR v. PLANT.

Municipal corporations—Councillors—Disqualification—Diversion of sinking fund.

The provisions of s. 4183 of the Consolidated Municipal Act, 3 Edw. VII., c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided. *Reg. ex rel. Cavanagh v. Smith* (1895) 26 O.R. 632, distinguished.

Watson, K.C., and *J. Grayson Smith*, for relator. *Rodd*, for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

[March 8.]

DOMINION IRON AND STEEL CO. v. McDONALD.

Statutes—Error in printing—Effect of amending Act—Absence of words giving retrospective effect.

The Assessment Act, R.S. (1900), c. 73, s. 4, sub-s. (p.), rendered liable to assessment property of the plaintiff company, which had previously been exempted. It was admitted that the words imposing the liability were not contained in the manuscript revision of the statutes but was inserted by error in printed copy deposited in the office of the Provincial Secretary, which it was declared should be held to be the original. By an Act of the following year, Acts of 1902, c. 25, the error was corrected by striking out of sub-s. (p.) of R. S. c. 73, the word "exempted."

Held, 1. By this amendment the Court was precluded from coming to the conclusion that the insertion of the word exempted in the chapter of the Revised Statutes amended was a mistake, and inserted and printed accidentally; it being assumed in the amending Act that the section amended was in full force and effect from the time it came into operation, and the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there.

2. In the absence of words giving the amendment a retrospective effect, it could not be so read, and the Act, as amended, would only apply to future assessments.

3. The liability of the plaintiff company having been fixed by R.S. c. 73, and there having been no appeal, the amendment would not have the effect of preventing the collection of the rate complained of.

H. A. Lovett, for plaintiff. *J. A. Chisholm*, for defendant.

Full Court.]

HAWLEY v. WRIGHT.

[March 8.]

Electric elevator—Negligence of employee—Action by parent—Common law rule—Contributory negligence—Improper rejection of evidence.

Plaintiff's son, who was employed as a watchman by the Government of Canada, and boarded at home with his father, was killed as the result of an accident while attempting to leave a passenger elevator in defendant's building. The deceased had entered the elevator for the purpose of seeing a tenant whose office was situated on one of the upper floors of the building, and not finding the person in whom he desired to see had continued to ride up and down in the elevator. He finally attempted to leave the elevator as another passenger entered, and just as the boy in charge started

the elevator, and was in the act of closing the door, and was caught between the floor of the building and the upper part of the elevator cage, and received injuries from which he died. In an action by plaintiff personally and as administrator of deceased claiming damages the jury awarded plaintiff "for loss of deceased's services since death \$1,500."

Held, that this part of the verdict could not be sustained without overruling the common law rule that in a civil court the death of a human being cannot be complained of.

On the trial evidence was offered of the proceedings in a judgment dismissing a former action brought by plaintiff as administrator suing for and on behalf of himself as father, and the mother of the deceased, under the Act corresponding to Lord Campbell's Act, in respect to the same alleged negligence.

Held, that the evidence was improperly rejected, and that for this reason also this part of the verdict could not stand.

The jury, in addition to the damages above mentioned, awarded "for damages to deceased's estate from the happening of the accident to death, and for necessary expenses \$37.50."

Held, that there being no contract for safe carriage, and the case being simply one of tort for alleged negligence, the action died with deceased.

Held, also, that there was evidence of negligence on the part of deceased, in attempting to leave the elevator at the time he did, which contributed to the happening of the accident, and which should have been submitted to the jury.

The learned trial judge, in summing up, said to the jury: "I cannot understand, myself, how the negligence of the deceased contributed to this accident."

Held, that this was equivalent to telling them that there was no evidence of the fact, and was misdirection.

Held, also, that the direction to the jury, that if they found that deceased pushed open the closed door to get out they might find that there was contributory negligence, was calculated to hinder the jury from considering any evidence which they, themselves, might be able to discover tending to shew that there was contributory negligence.

D. McNeil and W. F. O'Connor, for plaintiff. *R. E. Harris, K.C.*, and *W. E. Thomson*, for defendant.

[Full Court.]

FLYNN v. KEEFE.

[March 8.

Negligence—Action against contractor—Damages for personal injury and shock—Not severable—Remedy where insufficient damages awarded.

Defendant, a contractor, engaged in the construction of a building in the city of H. obtained permission to enclose a part of the street with a fence during the progress of the work. A portion of the fence was made movable, so as to permit the passage of teams, etc. During the day time was defendant's custom to move this portion of the fence to one side and

set it up against the stationary portion, leaving the area occupied by his workmen open to the street. The movable portion of the fence fell upon the plaintiff, M. K., while passing along the street, and caused injuries for which damages were claimed. The trial judge assessed the damages at \$25, and ordered judgment in favor of plaintiff for that amount. Plaintiff's solicitor took an order for judgment for the amount awarded, taxed his costs, and immediately demanded payment from the defendant under threat that if not paid judgment would be entered and execution issued. Subsequently an appeal was asserted from the judgment in so far as the same restricted the damages awarded to external injuries suffered by M. K., and refused to allow damages for shock consequent upon such external injuries.

Held, dismissing the appeal with costs, that in order to succeed plaintiff must have the whole judgment set aside for errors alleged in the assessment of damages; that the case was not one in which the damages were severable; and that if the trial judge erred in not awarding greater damages the only course open to plaintiffs was to appeal.

W. F. O'Connor, in support of appeal. *R. E. Finn*, contra.

Full Court.]

McECHEN v. McDONALD.

[March 8

Specific performance of agreement to convey land—Measurements controlled by description.

In an action, brought by plaintiff, claiming the specific performance of an agreement for the conveyance of land and a declaration that plaintiff was entitled to a reduction in the price of the land in proportion to the amount of land which defendants might be unable to convey. It appeared that defendants' testator entered into an agreement with plaintiff for the sale to him of "the house and premises on P. street, now occupied by Mrs L., 32 feet more or less frontage on P. street, and 67 more or less in depth. It further appeared that the land in question measured 67 feet in depth on one side, but that on the other side, at the rear, a piece of land measuring 13 feet by 14, had been taken out of the land previous to the time at which it was acquired by defendants' testator, and was fenced off from the portion conveyed to deceased and occupied by L.

Held, 1. The implication as to the uniform depth of the lot which would arise from the measurements given ought not to prevail, there being a certain description expressed in the agreement, viz.: the occupation by L.

2. Assuming that the distance to the rear line, from the measurement given, must be equal, the case was one in which the maxim *falsa demonstratio non nocet* applied, it being absolutely necessary to take the occupancy of L. in order to obtain the base line.

3. The description answering to the holding of deceased ought to prevail over the implied description or subsequent addition which would be false.

G. A. R. Rowlings, for appeal. *H. A. Lovett*, contra.

ownabend, J.]

[May 7.

MCDONALD v. WARWICK GOLD MINING CO.

Special endorsement.

The writs of summons in five actions brought against the defendant company were specially indorsed, in four cases for so many days labour at so much per day, and in the fifth case for goods sold and delivered at named price. On motion for judgment under the provisions of O. 14.

Held, dismissing the motion, costs reserved, that, to bring the claim within the terms of the order, it must be clearly shown in the endorsement that defendant agreed or contracted for the labour or the goods at the prices specified, and that the endorsement, being defective, could not be made good by affidavits showing a good claim for a specially indorsed writ.

H. B. Stair, for plaintiff. *E. P. Allisen*, for defendant.

COUNTY COURT, DISTRICT No. 1.

Wallace, Co. J.]

McCOLL v. BOREHAM.

[May 12.

Overholding Tenants Act, R.S. 1900, c. 174—Statute of Frauds—Oral letting.

An application was made by the original lessee for a writ of possession against a tenant, the lessee alleging that the tenant continued to occupy under a verbal agreement, sub-letting to him for one year which year had expired. The tenant alleged that the agreement to sub-let covered the whole period of three years granted by the landlord to the original lessee. There being a bona fide dispute as to the duration of the term for which the premises were sub-let, and the parties being equally reputable the judge held that the applicant had failed to establish that the tenant was wrongfully holding possession and a writ of possession was refused: *Re Myers v. Furrans*, 40 C.L.J. 317, and also, in addition to the cases there cited, *Moore v. Gillies*, 28 O.R. 358.

It was also contended on behalf of the applicant that even if the version of the tenant were accepted it appeared from such version that the verbal agreement for the sub-letting for three years was made in January, 1902, and was for a term to begin in the following May and cover a period of three years from May, 1902, and was therefore void under the Statute of Frauds.

Held, following *Hodson v. Heuland*, 2 Ch. D. (1896) 428, that the continuance in possession after the verbal agreement was a part performance of the contract sufficient to take the case out of the Statute of Frauds.

H. A. Lovett and *G. F. Pearson*, for original lessee. *A. A. Mackay* and *W. H. Fulton*, for tenant.

Province of New Brunswick.

SUPREME COURT.

En banc.]

KING v. DELEGARDE.

[April 22]

Summary conviction—Steps to appeal—Failure of magistrate to certify proceedings—Circumstances indicating fraud—Certiorari.

An information was laid before Delegarde, J.P., for assault against the applicant and one J. C. No summons was served, but the defendant having heard of the matter went to the magistrate and promised to enter into recognizance to appear. The magistrate then gave them a written notice, not in the form of a summons, stating when the trial would be held. Some days afterwards the applicant was informed by the magistrate that the trial would take place on the day stated, but a day or two later the defendants received through the mail a post-card from the magistrate stating that the trial was postponed until August 7, and that it would not be necessary to appear before then. On July 31 the applicant was arrested under a warrant and taken before the magistrate when the trial was proceeded with against both defendants notwithstanding the absence of J. C. Both were convicted. They gave notice of appeal to the County Court for the next November term. They asked the magistrate to certify the proceedings and duly entered into recognizance for the appeal, but the magistrate failed to certify the proceedings and the County Court Judge decided he could not go on with the appeal for this reason.

Held, 1. On motion to make absolute a rule nisi for certiorari to remove the conviction, that certiorari would lie notwithstanding section 887 of the Criminal Code, and notwithstanding the steps taken to appeal, the applicant having been thwarted in the prosecution thereof through failure of duty on the part of the magistrate.

2. The magistrate had no jurisdiction to proceed against both defendants in the absence of one of them, and there were circumstances indicating that the magistrate acted fraudulently, which of themselves would warrant the granting of the writ.

Rule absolute for certiorari.

G. G. Gilbert, in support of rule. Barry, K.C., for contra.

En banc.]

READ v. MCGIVNEY.

[April 22]

Negligence—Fire set by servant in violation of master's orders—Master's direction.

In an action brought in the York County Court to recover damages for the destruction of plaintiff's lumber and woodland by a fire alleged to have been negligently set by the defendant, and to have extended to the plaintiff's land, the defendant testified that he and a hired man, B., went to his fallow on the day in question (when a high wind was blowing during

the season of an unprecedented drought) for the purpose of clearing the land and piling up the remnants of fires which he had been burning the previous day, with a view of burning them at a future time; that he directed B. not to set any fires that day because of the danger from the wind, but that notwithstanding this B. did set fires, which extended out of the fallow. The trial judge directed the jury that if they believed that the defendant told B. not to set fire in the fallow and he did it in violation of orders the defendant was not responsible for the consequences.

Held, on appeal from a judgment of the County Court Judge refusing motion for a new trial, that the trial judge was in error in the direction complained of; that there was evidence that the servant was acting within the scope of his employment and that unless it were found, as a matter of fact, that the servant was not so acting within the scope of his employment which question the direction complained of withdrew from the jury, the prohibition to the servant would not exempt the master from liability appeal allowed with costs.

Crocket, for appellant. *Barry*, K.C., for respondent.

en banc.] ROYAL BANK OF CANADA v. HALE. [April 22.

Postponement of trial Change of venue.

An application was made to Mr. Justice Landry at the Victoria Circuit on behalf of the defendant to postpone the trial of this cause for want of material and necessary witnesses. The application was granted but upon terms that the venue should be changed from Victoria to Carleton.

Held, on motion to rescind this part of this order that the defendant having shewn an unquestionable right to have the cause postponed in consequence of the absence of witnesses, and it being the first time that an application to postpone had been made, the trial judge was not justified in imposing as an additional term the change of venue.

Carvell, for defendant. *Connell*, K.C., for plaintiff.

Province of Manitoba.

KING'S BENCH.

ardue, J.] FERGUSON v. BRYANS. [March 28.

Fraudulent preference—Assignments Act, R.S.M. 1902, c. 8, ss. 40, 48—Action by creditor to set aside preference when no assignment under Act—Amendment of statement of claim after expiration of time limited for suit.

This was an action commenced on the 2nd November to set aside as fraudulent preference an assignment to defendant dated 5th September 1901 of certain moneys payable under fire insurance policies

to secure defendant's claim against Cockerill. No assignment having been made by Cockerill under the Assignments Act, R.S.M., 1902, c. 8, plaintiffs alleged that they brought this action "on behalf of themselves and all other creditors of Cockerill who are willing to join in and contribute towards the payment of the expenses thereof; but under s. 48 of the Act where there has been no assignment, such an action must be brought "for the benefit of creditors generally or for the benefit of such creditors as have been injured, delayed or prejudiced." On 4th Dec plaintiff amended the statement of claim by adding, after the words above quoted, the words "and the same is brought for the benefit of the creditors generally of the said debtor." Sec. 40 requires that such an action should be brought within 60 days from the time the transaction impeached took place.

Held, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed or prejudiced, to impeach the transaction in question until the amendment of 4th December was made, which was more than sixty days after the date of the impeached transaction; and that this objection was fatal notwithstanding the provision in s. 48 (b) that "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th s. hereof."

The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within sixty days.

If the suit had been instituted in the name of the plaintiffs simply without any statement as to the capacity in which they were suing, the objection would have had less force; but here they stated specifically that they were suing, not on behalf of creditors generally or on behalf of the class of creditors mentioned in the statute, but on behalf of those only who should be willing to join in and contribute towards the payment of the expense of the suit.

Cases such as *Byron v. Cooper*, 11 Cl. & Fin. 556; *Dedford v. Boulton*, 25 Gr. 561; *Weldon v. Neal*, 19 Q.B.D. 394, and *Hudson v. Fernyhaugh*, 61 L.T.N.S. 722, deciding that when defendants are added by amendment the suit must as regards statutes of limitation be taken as commenced against them only when they are so added, are analogous and so are cases in our own courts, as *Irwin v. Beynon*, 3 M.R. 14, and *Davidson v. Campbell*, 5 M.R. 250, decided under the former Mechanics' Lien Act as to material amendments made in plaintiff's bill after the expiration of the time limited by the statute.

On the merits, also, the findings of fact were in favour of the defendant, and that the impeached assignment was not a fraudulent preference within the meaning of the Act. Action dismissed with costs.

C. H. Campbell, K.C., A.-G., and Haskin, for plaintiff. Howell, K.C., and Mathers, for defendant.

Richards, J.]

A. v. B.

[April 18.

Scandalous matter in affidavits—Disclosure by solicitor of confidential communication from client.

Plaintiff's claim was for payment of \$6,000 which she alleged defendant had received for her as the purchase money of certain real estate belonging to her which she had employed defendant to sell for her. She alleged that he had only paid over \$500 of the money. Defendant who is solicitor of this Court applied for an order for security for costs on the ground that the plaintiff was permanently resident out of Manitoba, and in support of the application defendant filed his own affidavit in which he set forth certain communications alleged to have been made by plaintiff to him as her solicitor and which, if true, showed that she was not legally married to her alleged husband, and stated in effect that plaintiff had returned to and was living with such alleged husband who was a non-resident. On plaintiff's application to have the affidavit taken off the files of the court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether plaintiff was permanently resident out of the jurisdiction or not as tending to shew that she was greatly under the influence of the alleged husband and therefore likely to remain permanently with him.

Held, allowing an appeal from the Referee that the affidavit should be ordered off the files as containing matter which plaintiff was entitled to have treated as privileged from disclosure, and which was scandalous and irrelevant to the application. The facts sought to be set up rather weakened than strengthened the case for an order for security for costs as removing the presumption arising from the duty of a wife to remain with her husband. Defendant to pay the costs of the application and appeal forthwith after taxation, such taxation to be as between solicitor and client.

Ratts, for plaintiff. Minty, for defendant.

Richards, J.]

ALLOWAY v. ST. ANDREWS.

[April 18.

Real Property Act—Application for leave to file second caveat while first one stands.

The defendants applied for a certificate of title under the Real Property Act, R.S.M. 1902, c. 148, for a parcel of land bought in by themselves at a sale for arrears of taxes. The plaintiff filed a caveat claiming title under a former sale by the same municipality for arrears of taxes, and issues were ordered to be tried; first as to whether plaintiff had acquired a good title under the first tax sale, and, in the event of his succeeding in this,

second, as to whether defendants had acquired a title as against the plaintiff. Subsequently the plaintiff having acquired title to the same property through the original grantee of the Crown, applied under section 140 of the Act for leave to file a second caveat setting up such title without removal or dismissal of his caveat already filed.

Held, that such application could not be granted, for the Court has no jurisdiction to order the filing of a new caveat until after the discharge, lapse or withdrawal of an existing caveat.

Mathers, for plaintiff. *Heap*, for defendants.

Richards, J.]

NEWTON v. SILLY.

[April 26.]

Fraudulent preference—Assignments Act, R.S.M., 1902, c. 8, ss. 38-42—

Novation—Rescission of contract partly performed.

A. M. Monat & Co., general merchants, being indebted to the defendants, the Gault Bros. Co., Limited, amongst other creditors, and not making payments satisfactory to the Gaults, the latter pressed them for payment though not in a peremptory manner. The defendant, Silly, then offered to buy out Monat & Co.'s stock in trade if the Gaults would accept him as their debtor in the place of Monat & Co. The Gaults having agreed to do so, Silly bought the stock at 82½ cents on the dollar and bound himself to Monat & Co. to pay their debt to Gaults and to procure a release from Gaults to them. He then paid to Monat & Co. in cash the difference between the purchase money and the amount of their debt to Gaults and bound himself to Gaults to pay Monat & Co.'s debt to them and procured from Gaults and delivered to Monat & Co. a release to them in full. This release involved the release also of Gault's claim against one Brown, a guarantor of Monat & Co.'s debt to them to the extent of \$1,200. Silly paid Gaults a part of the debt before this action. Within sixty days after the novation Monat & Co. made an assignment to the plaintiff as official assignee for the benefit of their creditors, and plaintiff then brought this action to set aside the transaction between the defendants, Silly and the Gaults as being fraudulent and void as against the plaintiffs and the creditors of Monat & Co. According to the finding of the trial judge, Gaults did not know Monat & Co. to be insolvent or have reasonable ground for suspecting that they were at the time when the arrangement was entered into, but entered into it partly because they thought Silly likely to be prompter in making payment than Monat & Co. and partly because they wished to secure him as a customer and expected to get him as such as a result of the arrangement.

Held, that as the contract had been partly performed and the parties could not be placed in substantially the same position as they occupied before it was made, it should not be rescinded. Giving the Gaults a right to rank on the estate, for dividends would not restore to them their rights

s against the members of the firm of Monat & Co. and as against Brown, which they had given up in good faith.

Quare, whether, in any case, a novation, such as here occurred, can be successfully attacked under the Assignments Act.

Haggart, K.C., and *Haskin*, for plaintiff. *C. P. Wilson*, for Silly. *Wilkins*, K.C., for Gaults.

[*Merdue*, J.]

RYAN *v.* TURNER.

[May 4.

Overholding tenant—Summary proceedings—Forfeiture for breach of covenant.

This was an application by way of summary proceedings under ss. 1-17 of the Landlords and Tenants Act, R.S.M. 1902, c. 93, as amended by 3 & 4 Edw. 7, c. 29, ss. 1-2, to recover possession of a hall let to defendants for five years from 1st November, 1901, at a rental of \$15 per month. The lease was in writing under seal and the lessees by it covenanted that they would not permit the hall to be used for the purpose of dancing except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease.

The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession.

Held, following *Moore v. Gillies*, 28 O.R. 358, that under the statute as amended, the judge can now try the right of the tenant to hold over, and that defendants had forfeited the lease and that a writ of possession should be issued in the landlord's favour.

Taylor, for plaintiff. *Andrews*, for defendants.

Province of British Columbia.

SUPREME COURT.

[Full Court.]

MILTON *v.* SURREY.

[Nov. 20, 1903.

Evidence—Finding based on positive evidence.

Appeal from judgment of MARTIN, J., awarding the plaintiff damages for injury caused to his land by water cast thereon through a culvert built by the corporation. At the trial the contention between the parties was as to whether or not the construction of the ditch had increased the flow of water

over the plaintiff's lands ; the plaintiff, who lived on the land and his witnesses swore that the flow was increased ; some of the witnesses for the corporation swore that it was impossible while others swore that it was not likely.

Held, dismissing the appeal, that where the trial judge accepts positive in preference to the negative testimony the full court will not interfere unless he is clearly wrong.

Morrison, K.C., and *Whiteside*, for appellants. *E. P. Davis*, K.C., and *R. L. Reid*, for respondent.

Full Court.]

[April 18.]

PLATH v. GRAND FORKS & KETTLE RIVER R. W. Co.

Railways—Barbed wire fence—Injury to horse therefrom.

The company maintained along its line of railway through a farming country a barbed wire boundary fence without any pole, board or other capping connecting the posts: plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed.

Held, that the fence was not inherently dangerous and therefore the company was not liable.

The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse.

Judgment of LEAMY, Co. J., reversed, IRVING, J. dissenting.

J. A. Macdonald, for appellant. *W. H. P. Clement*, for respondent.

COUNTY COURT.

Bole, C.J.]

SHEAVES v. GILLEY.

[April 12.]

Maritime Law—Contributory negligence.

Action for damages caused by the defendants' tug steamer "Flyer" having run into and partially destroyed plaintiff's fishing net. On the night in question, plaintiff, about 9.30 o'clock, was fishing off the southern bank of the Fraser River, when he first saw the steamer, which was then a considerable distance west of his boat, coming up river to New Westminster. She was on her proper course, keeping the starboard shore aboard, both because of sailing regulations and owing to the fact that deep water lies along the southern bank. Plaintiff thereupon commenced to pull in his

net and shouted, but did not waive his lantern which showed only a white light and placed in the bow of the boat, the boat being north of the net, which thus drifted into the ship's channel, along which the steamer's course lay. It was too dark to make it possible to see a net in the water at any distance beyond a few feet from the point of observation. The steamer came along, passed plaintiff's boat on the south side, running within about 30 fathoms thereof when the accident complained of occurred. The captain of the tug swore that although on the look out for fishing boats, he heard no shouts and saw no signal that would indicate that he was too close to plaintiff's boat or that there was a net out and that in fact he did not know he had injured the net till plaintiff so informed him the following morning. The defendants claimed that there was contributory negligence on the part of the plaintiff and a non-observance of the provisions of R.S.C., c. 79, s. 2., article 10, which (a) requires fishing boats and open boats to have ready at hand a lantern with a green glass on the one side and a red glass on the other side, (c) a fishing vessel when employed in drift net fishing shall carry on one of her masts two red lights in a vertical line one over the other not less than three feet apart, and that plaintiff had not complied with article (a) or article (b), on the contrary he only exhibited a white light which according to article (c) of s. 2 would simply indicate he was at anchor. Sec. 7 of the Act, sub-s. (a) says that "vessel" includes every species of vessel used in navigation.

Held, that plaintiff was guilty of contributory negligence in not waiving his lantern and in displaying a signal which merely indicated a boat at anchor, not then engaged in drift fishing, and the defendants could not by the exercise of ordinary care and diligence have avoided causing the injury complained of. See *Radley v. L.N.W.R.W. Co.*, (1877) 46 L.J. Ex. (H.L.) 575.

Myers Gray, for plaintiff. *F. W. Howay*, for defendants.

Book Reviews.

A Treatise on the Law of Landlord and Tenant in Canada. By EDWIN BELL, LL.B., of Osgoode Hall, Barrister-at Law, joint author of *Bell & Dunn's Law of Mortgages*; 997 pp. Half-calf, \$7.50. Canada Law Book Company.

As a result of the increase in values, following upon the growth of population, lands in this country are now held upon lease much more extensively than formerly, and the law of landlord and tenant has become one of the most important of legal subjects. No book on this branch of the law has been published in Canada for upwards of ten years, and

meanwhile a large body of statutory enactments and legal decisions relating to landlord and tenant has come into existence.

In this work the author presents a convenient and logical subdivision and arrangement of the subject. Part I deals with the relationship of landlord and tenant. Part II treats of the terms of their relationship, as, for instance, rent, etc. In Part III the rights and liabilities of the assignee of the term and the assignee of the reversion are considered. Part IV is a discussion of the modes of determining tenancies and of the rights and remedies of the parties upon determination. There is added in Part V a collection of forms both for conveyancing and for use in various proceedings relating to tenancies. The chapters on rent and distress are worthy of particular commendation as able and exhaustive treatises on these important subjects. The arrangement of the book is so excellent that the table of contents is in itself almost a sufficient guide to the reader, but a good index is added. The author, whose former works are favorably known to the profession, is to be congratulated upon this important addition to our legal literature. It may be added that the printing and binding are in the style of the best English law publications.

The Law of Contracts by THEOPHILUS PARSONS, LL.D. Ninth edition.

Edited by John M. Gould. Boston: Little, Brown & Company, 1904.

In 1853 the learned author produced the first edition of "this monument in the law." This work is so well known, that it is only necessary to say that a ninth edition has just been issued by the enterprising publishers. Mr. Parsons has done for the United States what Mr. Addison did for England. In this country we need the former as well as the latter of these great works; for in several matters there must needs be, from similarity of conditions, a strong family likeness between contracts in the United States and the Dominion.

In the present edition, the author's text has occasionally been shortened and altered both to meet new orders of things, and also in view of the settlement by recent decisions of many points discussed in previous editions. The fact that some six thousand authorities are added in the present edition shews the amount of labour expended on the work by Mr. Gould. We notice that numerous monographic articles and notes are referred to in addition to the cases cited. English authorities also abound; but, on references to cases in our Courts, there is a lack, which might well be supplied in the next edition. The work is an encyclopædia as well as a treatise.

were rendered when the exigencies of justice would seem to have been better served had a verdict of guilty been returned. How far this was due to the personality of the judge it is difficult to say, certainly in his view it were better that twenty guilty ones should escape punishment rather than that one innocent one should be condemned. His portly form will be missed at Osgoode Hall where his memory will be cherished for many years by those who knew him as an able lawyer and an honest man.

TRADE AND LABOR UNIONS.

JUST CAUSE AND EXCUSE IN LABOR DISPUTES.

- I. *Introductory.*
- II. *Origin of just cause or excuse.*
- III. *Earlier indications of the principle.*
- IV. *When acts require justification.*
- V. *Cases where justification disallowed.*
- VI. *Matters of excuse.*
- VII. *Conclusions.*

I. *Introductory.*

England is a trading country, and it is not surprising to find that until 1825 combinations among workmen were illegal. But almost coincident with the gift of a vote came the right of association in labor. Advantage was taken of this, and what became known as Trade Unions were formally legalized in 1871.

The influence of these bodies in England was very marked both in limiting the industrial output, and in securing complete control of the classification and pay of artisans. Their wealth did not attract attention until, through an alliance of several of them, a struggle occurred which lasted for almost a year and cost an enormous amount of money. Prominence has its drawbacks. Consequently an experiment was tried by capital in the *Taff Vale* case (1901) A.C. 426, and its conclusion startled the workmen of England. The outcome has been that in every case against a trade union the fight has been to a finish. And as a natural consequence we find old precedents, which had been supplied by minor and less far-reaching disputes, reviewed and reconsidered.

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mental. Such is the oft quoted dictum of Sir Wm. Erle, in his work on Trade Unions (1869, ed. p. 12). It is as follows :

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, *not in the exercise of the actor's own right*, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

It will be observed that the learned writer limits the original right to the doing of such acts as either (1) do not conflict with the acts of others in possession of similar rights, or (2), if they do conflict, then to such acts as are an exercise of the actor's own individual right.

Hence collision thus anticipated is made lawful by just cause and excuse. This theory is important to a clear understanding of the subject. There are expressions in the cases which suggest another rule of decision. But when examined they are readily harmonized with it. For example, Lord Herschell, in *Allen v. Flood*, (1898) A.C. p. 138, discusses the underlying right of every man and asserts that everyone has a right to do any lawful act he pleases without molestation or obstruction, which wider right also embraces the right of free speech. He dissents from the view that this right is limited to damage to property or trade, and says that the *Mogul* case (ante) rests upon this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom and when, and under what circumstances and upon what conditions the parties pleased. And he adds (p. 139) that in his opinion, no one is called upon to justify either act or word merely because it interferes with another's trade, or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shewn to be in its nature wrongful, and thus to require justification. And in *Boots v.*

Grundy, 82 L.T. 769, Bigham, J., observes that no lawful act requires to be defended by any just cause or excuse—it carries its just cause or excuse with it.

At first sight these views appear to be inconsistent with Sir William Erle's theory. But they are not really so. An act may be lawful or unlawful, according to circumstances. For instance a trespasser may be ejected. The force necessary to do so may or may not constitute an assault, and this will depend on whether sufficient notice was given before it was applied. If done under proper conditions then the act is lawful. But its lawfulness involves the possession of an excuse sufficient in law. It is rightful because of the excuse and not *per se*. Hence, an act lawful in that sense needs no justification. And because, in that sense, it carries its own just cause or excuse with it, it is a lawful act; and so the words of Bigham, J., apply. But the justification which an act, lawful *sub modo*, carries with it must be capable of ascertainment and definition, and so the process of determining whether it is lawful requires an analysis of the right asserted.

It may safely be said that in order to adjudge an act to be a proper exercise of a legal right, evidence must be given which satisfies the Court that it is within the definition of Sir William Erle and is an exercise of the actor's own legal right and not merely an obstruction and so intended.

From this discussion may be gathered this axiom that the lawfulness of the acts done in the professed exercise of a legal right must in all cases be judged by the possession or absence of an actual legal right. In the one case interference causing injury gives no cause of action, and in the other it does.

Now lawfulness does not import absence or intention to injure, nor does it depend upon it. Hence malice or improper motive are not important, and when acts are scrutinized the purpose is, not to discover the underlying mental resolve, but rather the position of the actor so as to determine whether what he has done is consistent with and supports the position which he asserts to belong to him. To illustrate: The circumstances under which resolutions were passed by a sliding scale committee of the miners were considered, and the views of the executive committee were examined, in order to see whether what was done was really the executive committee's action, and not in fact that of the sliding

scale committee: *Glamorgan Coal Co. v. South Wales Miners Federation* (1903) 1 K.B. at pp. 126, 127.

III. *Earlier indications of the principle.*

Apart from what may be gathered from the *Mogul* case, there are indications in *Allen v. Flood* of the adoption of the principle of just cause or excuse. In that case Wills, J., who agreed with the majority of the House of Lords, thinks (p. 48) that neither the *Mogul* case nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others, is that it is one of the circumstances to be taken into consideration in determining whether there is or is not just excuse for the wilful infliction of loss upon others.

Hawkins, J., who held with the minority (at p. 24), discusses the improbability of the defendant's action being dictated by a desire to protect trade interests, and is satisfied that they were not in any sense acting "in the exercise of any privilege, or in defence of any rights either of his own or the boiler makers."

In the House of Lords, where the case went off upon the weight to be attached to the presence or absence of malicious intent there is throughout the judgment an appreciation of the effect of lawful competition as an excuse for injury not limited to trade competition, but as extending to competition in labor. And Lord Herschell's already quoted remarks shew that the effect of the exercise of a competing right is fully recognized. Lord Macnaghten, in *Quinn v. Leatham*, may be said to have fully defined the law on this head when he said (p. 510) that the violation of a legal right committed knowingly is a cause of action . . . if there be no sufficient justification for the interference—which is equivalent to stating the proposition that the interference is wrongful if not supported by the possession of an existing legal right.

IV. *When acts require justification.*

The acts to be justified may be those of a single individual or they may be those of individuals similarly interested tending to the same end but without agreement. They may be the concerted acts of members of an association. The very agreement to do

them may be in itself the act be in themselves lawful. See and *Quinn v. Leatham*, ante.

And the results of the act relation, or the preventing c on of business, or they may mind, business or profits c Consequently the justification different rights and from n impossible to classify either way and examples will have

The Courts have refrained rule as to when justification L.JJ., think it well-nigh imp ante at pp. 573, 577, and Lo the "good sense of the tribun

Both Bigham, J., in the C Williams, in his dissenting (*Glamorgan* case (1903) 1 K. of the right of an individual to of such advice a contract is Bigham, J., cites the case of a b tract of service which is inju advice as to whether or not it asked and is honestly given by cludes that if from all the interference was justified, a c the adviser. It is of course o the contract broken an action contract. Lord Justice Va cases referred to is of the opi are covered is that a commu the relation of the parties affe interest is not in itself and complete justification. Wills of it as only one of the circu tion in determining wheth excuse. Lord Herschell in furthering one's own interest unlawful acts. And Bigham

1 K.B. 118 at p. 134 agrees in these words:—"If the real object were to enjoy what was one's own or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without illegal acts it would not, in my opinion properly be said that it was done without just cause or excuse, but not if done merely with the intention of causing temporal harm without reference to one's own lawful action or the lawful enjoyment of one's rights."

Romer, L.J., in the *Glamorgan* case (p. 574), points out that a community of interest is no answer to an action for procuring a breach of contract.

Stirling, L.J., admits (p. 577), the force of the argument that duty may protect, but is evidently of opinion that if the fulfilling of the duty to advise carried the adviser into active interference with an existing contract he would be liable.

It is obvious that community of interests as an excuse shifts the ground from the sole interest of the offending party in exercising his legal right. It either admits a right of outside interference with a matter in which another party is exercising his individual right or brings in the moral excuse of filial, fraternal or friendly duty instead of an existing and recognized right.

Until the House of Lords has spoken it is impossible to say to what extent and under what circumstances a defence will be established by the duty to advise or to actively interfere. In such cases as are illustrated by the one so forcibly cited by Stirling, L.J., (a father causing a child to break off a marriage engagement with a person of immoral character) a difficult problem is suggested. It may be that the right to physical health and the enjoyment of life to which every one is entitled (which in itself forms a valid excuse for breaking a contract) will enure to protect those who act to secure it. In the meantime, and speaking of cases in which only money interests are involved, it is extremely doubtful whether community of interest will be sufficient as a defence, though it may be a prime factor in determining the actual relationship of the parties.

The Divisional Court in *Read v. Friendly Society*, (1902) 2 K.B. 88, have laid down what seems to be a fairly comprehensive rule. They hold that the justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself,

Trade and Labor Unions.

and it will not be sufficient for him to show that he acted in good faith or without malice, or in the best interests of himself or others, or on a wrong understanding of his rights.

The case of the *Mogul Steamboat Co. v. McGregor Gow* (1892) A.C. 25, established, in a popular sense, competition as a justification. But the learned judges are careful to point out that the case may be supported upon the ground that the legal right of the plaintiffs was infringed. It was really a conflict of competing rights of trading and the effect of it is that the defendants used their right to do business so as not to infringe the rights of the plaintiffs, though to their detriment. If the defendants had, under the guise of trade competition, used force to keep off those desiring to serve the plaintiffs they could not have done that as a justification. Yet those means were actually used in *Tarleton v. McGawley*, 1 Peake N.P.C. 270. The effect was precisely the same in both cases and the plaintiffs' right invaded, if any were infringed, was exactly identical. It is in the excuse that the difference lies. In one case trade was pushed by trade means, in the other by practices not recognised as lawful, except in time of trading is superseded by war. They were, as Lord Holt put it out in *Keeble v. Pickersgill*, 1 Mod. 74, 131, done in the way that was lawful under the guise of competition, yet were in themselves violent and unlawful.

V. Cases where justification disallowed.

Upon the complicated questions always arising out of combinations in which various interests become involved, three cases may be looked at. They present the same problem in different ways. They are : *Read v. The Friendly Society* (1902) 2 K.B. 732; *Giblan v. National Amalgamated Labourers Union* (1902) 1 K.B. 600; *Glamorgan Coal Co. v. South Wales Miners Federation* (1903) 1 K.B. 118, 2 K.B. 545; to which may be added, *L. v. Wilkins* (1896) 1 Ch. 811.

These were all cases of procuring breaches of contract. The defendants in each were a federated body of workmen, and the disputes were actual ones carried on in what was believed to be the true interest of the working class and the federations.

In the *Read* case the federation compelled the employer to dismiss an apprentice, thereby procuring the breaking of a contract between the latter and his employer. The justification p

ward was the interest of the Union and the fact that the employer had agreed with the federation not to employ apprentices except in conformity with their rules. They claimed the right to compel him to perform his contract.

In the *Giblan* case the wrong done was both causing the plaintiff to be dismissed from his employment, and also in preventing him from obtaining further employment. The justification put forward was the fact that the plaintiff had embezzled funds of the union and that it was in its best interests that he should be prevented from obtaining employment until restitution was made.

In the *Glamorgan* case the injury was a breach of contract in that the miners stopped work on several days as ordered by their committee, and the justification alleged was that the stop days were ordered for the purpose of keeping up the price of coal and in that way benefitted the colliery owners (the plaintiffs), and that their action was not intended to injure the latter, but rather to benefit them, and only to interfere with the middlemen who were selling coal at too low a rate.

In the case of *Lyons v. Wilkins* the same absence of desire to injure the persons who actually suffered damage, and the same intention to injure a third party existed. The justification set up was that a trade dispute actually existed, which, although not involving the person injured, had to be dealt with in such a way as affected him, though there was no desire to injure him.

It will be observed that the interest of a combination or union as a justification runs through all of those cases. In the *Read* case the interests of the union were involved, because, unless they could control the employment of apprentices, a large portion of the power of their union would be gone. In the *Giblan* case the interest of the association was only collaterally involved, that is the plaintiffs obtaining employment was no direct detriment to the union. Their action was intended as a punishment to him and it is evident that it was not taken simply for the purpose of protecting employers against a dishonest employee, or because the union men were refusing to work with him. If they could succeed in preventing the plaintiff from obtaining employment they would secure re-payment into the funds of the association of the amount which had been stolen, or at all events, they honestly expected so to do.

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him. It was rather a case where the intention was to carry out some spite against the man, or had for its object to compel him to pay a debt, or any similar object, not directly connected with the case, against the man, and the defendants were liable to the man for the damage consequently suffered as being an inexcusable interference with the man's ordinary right of citizenship. The case is further noteworthy for holding that a union is liable where the acts done were by persons in the service of and for the benefit of the union, though not directly authorized by it to do as they did.

In the *Glamorgan* case and in *Lyons v. Wilkins* the point established is that even where the honest belief existed that the interests of the men required the objectionable course to be pursued, and although there was not only no intention to injure the plaintiffs, but a belief that the course taken was for their benefit as well, yet if injury ensued the union were liable. Romer, L.J., says (p. 575) that what the defendants have to justify is their action, not as between them and the members of their union, but as between themselves and the plaintiffs the employers. And Stirling, L.J., (p. 578) holds that, although the men persuaded themselves that it was in their master's interest as well as their own that they should have power to take holidays at that period this was a point on which the masters were entitled to have their own opinion.

VI. *Matters of Excuse.*

Lord Brampton in *Quinn v. Leatham*, dealt with this vexed question of just cause or excuse where a combination of men act in regard to what they consider their mutual interests. He indicates (p. 528) what might protect them, and suggests the following:—(1) Acts done in furtherance of any of the lawful objects of the association as set forth within registered rules; (2) in support of any lawful right of the association or any member of it; (3) to obtain or maintain fair hours of labor or fair wages; (4) to promote a good understanding between employers or employed, and workmen and workman; (5) or for the settlement of any dispute. Lord Lindley in the same case points (pp. 536, 537) to many acts for which no justification exists. They are:—(1) giving a black list (2) dictating to the plaintiff and his customers and servants what they were to do; (3) disturbing them in their employment or

liberty of action and he refers (p. 541) to acts which are forbidden by law, such as picketing, besetting and threatening.

In *Boots v. Grundy*, 82 L.T. 769, Phillimore gives instances of what is or is not just cause or excuse. Political or religious hatred, a spirit of revenge for previous real or fancied injury are not accepted as valid, but to further one's own prosperity or if the act be constructive, or destructive only as a means of being constructive then sufficient excuse exists.

VII. Conclusion.

In closing it may be interesting to note the view of Romer, L.J., in the *Glamorgan* case and what he thinks ought to be considered in determining whether just cause or excuse does or does not exist.

Those elements are:—(1) the nature of the contract broken; (2) the position of the parties to the contract; (3) the grounds for the breach; (4) the means employed to procure the breach; (5) the relation of the person procuring the breach to the person who breaks the contract, and (6) the object of the person in procuring the breach.

To this must be added that vitally important factor, namely, the effect of combination as distinguished from the results of individual acts. A combination cannot act with as free a hand as an individual—as has been said, a baker can refuse to supply me with bread, but if all the bakers combine to refuse me bread their agreeing becomes a conspiracy to injure me. Hence in dealing with just cause and excuse, it is obvious that where two or more combine to do an act causing injury, their defence will be scrutinized more keenly and will always lack one advantage possessed by an individual, namely, the innocency of the means used.

Mr. Chalmers-Hunt, the great English authority upon this subject has propounded a view which, speaking generally appears to afford the best view point for considering just cause or excuse. It is that the right to attack persons for the sake or by way of competition is an indulgence conferred by the law, and, being in itself an evil, although a necessary one, its exercise is to be jealously limited and confined so as to exclude from protection acts of manifest tyranny and malice.

This puts the onus where it properly belongs, and if adopted

by the courts the doctrine of necessary evil will put at rest a much agitated branch of modern law. It bears an interesting resemblance to the use of privilege as a defence in actions for libel and slander.

The American view may be put side by side with that of Mr. Chalmers-Hunt. Mr. Eddy, in his recent work on Combinations, says (1901 ed. par. 470): "But when it clearly appears that there is an entire absence of legitimate motives, and that the damage is occasioned by acts which are the result of a deliberate intent to injure, then the law has, or should have, no difficulty in stamping the transaction, considered as an entirety, unlawful, and awarding the party injured whatever damages he has suffered. Such a conclusion does not involve the proposition that malice in and of itself is a cause of action, since a man may do many things not in themselves unlawful in the legitimate pursuit of his own lawful business, but at the same time with the malicious intent to injure others; but a man may not do wantonly and without any hope or expectation of profit or legitimate advantage to himself that which he knows must and which he intends shall inflict damage upon another. The practical question for court and jury is not so much whether or not malice exists, as it is whether or not the acts complained of were done in the legitimate pursuit of a legitimate business, or the legitimate exercise of some personal privilege: if so, then there is no redress for the party injured, since the law cannot undertake to distribute the damage according to the preponderance of the motives."

FRANK E. HODGINS.

JAPANESE LAW AND JURISPRUDENCE.

An article recently appeared on the above subject from the pen of Mr. A. H. Marsh, K.C., Toronto, in the *American Law Review*. His information was obtained from two lectures delivered in the United States by Dr. R. Masujima, of the Tokio Bar. We give the following extracts:

These lectures throw a flood of light for foreigners upon the present position of legal affairs in Japan, and it has occurred to me that possibly some persons might be interested in learning how some features of Japanese law and practice affect the mind of a foreign onlooker. The learned lecturer tells us that Japan possesses an excellent code of laws, and that, while in other countries codi-

fication has come after centuries of growth formulated rather as an introduction to an

The learned lecturer also informs us that in Japan (during the feudal days, which years) litigation was almost unknown, as settled without recourse to the law, and official influence tended to discourage all that, even when recourse was had to the rigidity of the rule which was laid upon missive was their temper that a case at law more than a bare statement of the case or an award rather than the decision of a judge informs us that: "Prior to the introduction of the habits and affairs of the people were simple and primitive, their disputes were regulated by immemorial usage. The conception of contracts had scarcely any place in the almost always settled their disputes through the perhaps a little more frequently, but very of the law. The forum for the settlement a family council, or the arbitration board of townsmen." Nothing could be more different from the traditions, customs and habits of the Japanese people.

It is curious to note what the learned lecturer tells us of the law of ancient Japan relative to banking and commerce generally. The *lex mercatoria* appears to have developed among the various nations of the world in the course of centuries, so as to produce very different forms of the law merchant, which, in their broad similarity one to another. Japan appears singular in this respect, for she, too, had her own law running on lines parallel to the *lex mercatoria*.

The learned lecturer tells us that the adoption of the present system of codes was hastened by the desire of the people to rid their country of the extrajudicial influence in Japan by the courts of foreign nations. It was expected that the foreign nations would censure Japan first furnished herself with a recognition of laws. This, we are told, led to the adoption of the present system.

ready-made code, instead of allowing the indigenous law to grow and develop and formulate and broaden down from precedent to precedent until this native product should form a complete and systematized body of laws springing from and fitted to the tastes, the customs, and the requirements of the people.

When a model was sought whereon to base her new system of laws, Japan had to choose between the civil laws of the continental nations of Europe (founded upon the Roman law) and the dual system of England consisting of common law and equity, now practically fused into one system under the English Judicature Act.

Whether wisely or otherwise, she chose the continental system as her model, and, accordingly, the law in its entirety is statute-made law, and we learn from these lectures that the Japanese are already experiencing the defects which are likely to arise whenever the law is reduced to a written code. We are told that the courts committed the error of adhering too closely to the letter of the law instead of expounding it in such a manner as to make it work out justice in accordance with the true intent and spirit of the law. The only remedy for such a state of affairs is to place upon the bench judges who are lawyers of wide experience, and who are not only learned in the law, but who have acquired their learning by profound study of jurisprudence, and the principles of law upon which codes are founded, and not merely by memorising the codes themselves. If such men are broad-minded men of courage, they will bear in mind that written codes are the mere framework of the law, and that the judges, by their interpretation of the codes may make their system of law a living and growing system expanding and modifying to meet the just requirements of the people. Lord Coke tells us that "He who considers merely the letter of the law goes but skin deep into its meaning." A written code may be so treated as to make it a living and growing organism. To treat it in the latter way requires a strong man conscious of his own strength, based upon knowledge.

It is astounding to learn from these lectures that the judges of Japan are not generally drawn from the bar, but are appointed directly from the graduates of law schools and colleges, and that the appointments are based upon examination; that pre-eminence at the bar is not a necessary qualification for the bench, and that the bench is not a post of honor and emolument to which men

look forward with ambition. The appointment of judges by examination surely must have been borrowed from China. So long as such a system prevails, foreign nations will have reason to regret that they ever surrendered their extraterritorial jurisdiction.

We learn from these lectures that people in Japan very rarely think of the lawyer as a professional guide, but that they generally do their own legal business, and rarely consult a lawyer until after a suit is actually pending, and that, if they do seek his assistance it is generally in the last stages of the suit.

This is, indeed, a rough, raw, and democratic way of doing business, and it will doubtless work its own cure in the course of time when corporations, manufacturers, merchants, employers of labor, landlords, and others discover that a skilled lawyer is as necessary for the successful conduct of litigation as a skilled general is for the successful conduct of a war, or skilled artisans are for the successful conduct of a factory.

As soon as it becomes the custom for one of the litigants to employ a lawyer, it will not be long before both parties begin to employ one, for experience will soon teach them that skill and success go hand in hand, and that, if one side employs a skilled advocate and the other side does not, the latter will be badly handicapped. The saying in England is that he who acts as his own lawyer has a fool for a client.

One is surprised to learn from these lectures that in the Japanese courts they have no system of pleading by which the issues to be tried between the parties are defined, and that neither party knows with any degree of accuracy what his opponent's case or defence is until trial, when the judge, by oral questions, elicits what are the real points in controversy. There is no such thing as a preliminary examination of the parties for discovery, or a preliminary production of documents in the possession of the parties, and finally the examination of witnesses is conducted by the judge and not counsel for the parties. To one who is familiar with the procedure of English courts, this system would appear to be fairly described as disorganization striving with chaos in topsy-turvydom. English and American lawyers are thoroughly convinced that truthful evidence is obtainable from witnesses only through the medium of skilful cross-examination. It may be that parties and their witnesses in Japan are so thoroughly imbued with the spirit of truth, and are so possessed of the love of justice, integrity, and

righteousness that none of the machinery of the law, which is found necessary in other countries to prevent surprise and the giving of false evidence and generally to promote the due administration of justice, is there deemed needful.

It may be that this state of procedure and practice accounts for the non-employment of lawyers above referred to, and also that the non-employment of lawyers accounts for the toleration of the said state of procedure and practice, so that each phase reacts upon the other and produces motion in a circle, instead of progress.

The lack of confidence felt by English courts in sworn testimony when the witness has not been subjected to cross-examination is exemplified by the saying of one judge that "the truth will sometimes leak out, even in an affidavit."

Perhaps the most interesting portion of Japanese law is that part of the civil code which deals with family relations. While the remaining portion of Japanese law has in great part been formulated in accordance with the ideas of modern Europe, this portion of Japanese law has been in great part formulated in accordance with ancient Japanese law. This being the case, it is interesting to note the similarity between the Japanese law of family relations and the Roman law touching the same subject. The learned lecturer tells us that "There is no other department of law which enters so closely into the heart and foundations of society as the law of 'family relations.'" This doubtless accounts for the fact that, while Japan was ready to adopt the general body of the law of modern Europe, she was not willing to revolutionize the indigenous law which circles around the hearth-stone. Society in Japan has gone through the stages of family groups, village community, and feudal system, which latter system lasted until the Revolution of 1868. This is the order of progress which has been recognized elsewhere throughout the world, and, speaking in general way, Japan has now brought her jurisprudence into line with the latest phase of modern European advancement. In one respect, however, there is still room for growth along the line recognized throughout the world as the line of progress, and that is with respect to the law of family relations. Dr. Masujima tells us that it has been generally stated that in Japan the family is still the unit of society and not the individual, and he proceeds to argue that this is not strictly accurate, because the law of Japa

does, to a considerable extent, recognize the position of the individual, but he makes it clear that the saying, which he combats, has in it a considerable deal of truth. If we examine what Sir Henry Maine says about the progress of primitive society, we shall find why Dr. Masujima, loyal to his country and jealous of her reputation for progressiveness, is unwilling to admit that the family, and not the individual, is there the unit of society. Maine tells us that society in primitive times was not, what it is assumed to be at present, a collection of individuals. In fact and in view of men who composed it, it was an aggregation of families.* The contrast may be most forcibly expressed by saying that the unit of an ancient society was the family, of a modern society the individual.

In certain winding up proceedings at Osgoode Hall, Toronto, recently, the certificate of the incorporation of a Company was put in which showed the formation of a Company of a multiform and hydra-headed character not often seen. Certain enterprising Canadians obtained the charter in the State of West Virginia. The concern was called a mining development company. The powers given were (using a redundancy of words) to lease, purchase, own, operate, etc. mining properties or options, and to sell and to dispose of the same; to operate mills, etc.; to buy and sell all kinds of merchandise; to erect and operate boarding houses and dwelling houses; to buy, build on, and mortgage real estate; to borrow money in every conceivable way; to construct, acquire, and develop water powers; to construct and operate necessary machinery for steam, electrical power and light and sell the same; to transact a general warehousing and forwarding business; to buy and sell shares of other mining companies or corporation; to organize, incorporate and to promote the organization of other companies; to construct, own and operate tramways and roadways, by engines and all other kinds of machinery vehicles and vessels, and in general to do everything else. Finally, to carry on the Company's business in any province of this Dominion, its head being in the City of Toronto. For the purpose of forming the said corporation the handsome sum of \$125 was subscribed and paid in, five persons taking twenty-five one dollar shares each. It was sad that so magnificent a scheme should, whilst yet in its infancy, have its funeral obsequies under the supervision of the Master in Ordinary. Who the chief mourners were did not appear. Probably not so many as there would have been had the infant come to maturity.

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TRADE NAME—"CALEDONIA WATERS"—WORD DESIGNATING LOCAL SOURCE OF GOODS.

Grand Hotel Co. v. Wilson (1904) A.C. 103, was an appeal by the plaintiff from the Court of Appeal of Ontario reversing a judgment of the Chancellor and dismissing the action. The action was brought to restrain the use by the defendants of the word 'Caledonia' as applied to mineral waters sold by them. The plaintiffs derived mineral waters from various springs in the Township of Caledonia, where they carried on business, and it was known in the market by that name. The defendants had discovered other springs in the same township and sold the product thereof as water "from new springs in Caledonia." The plaintiffs claimed that the word Caledonia in reference to the water sold by them, the word had lost its geographical sense and had acquired a secondary meaning by which the waters from the plaintiffs' springs were designated, and that therefore the defendants could not now use that name as a designation of mineral water sold by them. The Judicial Committee of the Privy Council (Lords Davey and Robertson, and Sir Arthur Wilson) while conceding that the defendants could not use the word "Caledonia" in such a manner as to pass off their goods for those of the plaintiffs, were nevertheless of the opinion that the plaintiffs had not an exclusive right to the use of the word; and they thought that the defendants by describing their water as from "the new springs at Caledonia" sufficiently distinguished their water from that of the plaintiffs, and that the use of the word "Caledonia" by the defendants as a designation of the locality from which the water came could not be interfered with. The appeal was therefore dismissed.

MARTIAL LAW—JURISDICTION.

Attorney General v. Van Reenen (1904) A.C. 114. This was an appeal by the Attorney General of the Cape of Good Hope from a decision of the Supreme Court of that colony purporting

to quash two convictions made for contraventions of martial law. The magistrate had used printed forms of his magistrate's court with printed headings appropriate thereto, but it was clear on the evidence that the convictions had been made in the administration of martial law. Under these circumstances the Judicial Committee of the Privy Council (The Lord Chancellor, Lords Davey, Macnaghten and Lindley, and Sir Arthur Wilson) held that the Supreme Court had no jurisdiction and their order purporting to quash the convictions was reversed.

CONTRACT—ON BEHALF OF COMPANY BEFORE ITS INCORPORATION—RIGHTS OF COMPANY.

Natal Land Co. v. Pauline Colliery (1904) A. C. 120. This was an appeal from the Supreme Court of Natal. The action was brought by the Pauline Colliery for the specific performance of a contract alleged to have been made in its behalf before its incorporation. The Court below had given judgment for the plaintiffs, but the Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir Arthur Wilson and Sir John Bonser) reversed the judgment, holding that a company cannot by adoption or ratification obtain the benefit of any contract purporting to have been made on its behalf before it was in fact in existence. In such a case a new contract must be made with the company after its incorporation.

PRACTICE—DISCOVERY—SHIP'S PAPERS—ACTION BY INSURERS FOR MONEY OVERPAID—FRAUD.

Boulton v. Houlder (1904) 1 K.B. 784, was an action by insurers to recover money overpaid on marine policies of insurance owing to alleged fraudulent misrepresentations by the insured; and on an application by the plaintiffs for further discovery it was held by Bucknill, J., that the plaintiffs were only entitled to discovery of other policies in possession or control of the defendants, but not policies in the hands of the liquidator of a company into which the owners of some of the ships insured had been merged, neither the company nor its liquidator being parties to the action. On appeal, however, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) decided (Romer, L.J., dubitante) that the defendants were bound to state on oath the steps they had taken to enable them to produce the policies, and, failing to produce them, they were bound to give such information as to their contents as they could obtain by reasonable exertion.

Correspondence.

PROFESSIONAL ADVERTISING.

Editor Canada Law Journal:

DEAR SIR,—Would you kindly inform me, either directly or through the columns of your next issue, whether or not it would be unprofessional for a barrister and solicitor to engage in and advertise himself as engaging in the business of loaning, real estate business and fire and life insurance, in connection with or as a side issue to his regular practice and business as a lawyer. This of course, specially applies to country practitioners, to meet the serious competition of the so-called unlicensed conveyancers, who by judicious advertising and the active prosecution of such a general office business, are thus enabled to secure a very liberal share of the conveyancing and collection business which should be done and could be retained by the local practitioners if they were not so handicapped by the restrictions of a professional "etiquette" of past decades. With this handicap removed it would then be a question of ability and of business push, and perhaps also of personal character and standing. I venture to think there would then be no need of legislation against "unlicensed" conveyancing.

Yours,

B.

[The above letter brings up a matter of interest to many in the profession and more especially country practitioners. We should be glad to have the views of some of our readers on the subject. We have great sympathy with those in the profession who are handicapped in the way that our correspondent speaks of.—Ed. C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J., Meredith, J.]

[Feb. 9.

JOHNSTON v. RYCKMAN.

Costs—Taxation between party and party—Counsel fees paid to partner of litigant—Affidavit of payment made by counsel—Brief—Correspondence.

Where counsel fees were paid by a member of a firm of barristers and solicitors to his partner for the latter's services as counsel in an action in which the former was defendant under a prior agreement to pay such fees as would be payable to counsel outside the firm ;

Held, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. *Henderson v. Comer*, 3 U.C.L.J. 29, followed.

Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross examined.

Held, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit.

Held, also, per BRITTON, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties should not be interfered with on appeal, although the correspondence was not used at the trial.

W. R. Smyth, for plaintiff. *W. E. Middleton*, for defendant.

Boyd, C., Ferguson, J., Teetzel, J.]

[Feb. 11.

REX v. NURSE.

Liquor License Act—Conviction—Third offence—Evidence of previous convictions—Improper reception—Subsequent deletion.

A conviction of the defendant for a third offence against the Liquor License Act, R.S.O. 1897, c. 245, was quashed on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act.

Held, also that the jurisdiction of the magistrate was gone when he admitted the improper evidence, and his competence was not restored by its deletion.

Haverson, K.C., for defendant. *Cartwright*, K.C., for Attorney-General and magistrate. *Dewart*, K.C., for prosecutor.

Teetzel, J.]

FRASER v. HAM.

[April 18.]

Prohibition—Division Court—Trial by jury—Claim under \$20—Counter claim over \$20.

Plaintiff sued in a Division Court for \$14 for rent; and defendant besides filing a dispute notice counter claimed for \$60 damages and asked for a jury but the County Judge refused to place the case on the list for trial by jury. On an application for prohibition,

Held, that the filing of the counter claim did not entitle the defendant to have the plaintiff's claim tried by a jury, but that section 160 of the Division Court Act R.S.O. 1897, c. 157 did entitle him to that right in respect to his counter claim: and prohibition as to the latter was directed to issue subject to the right of the judge to order that the counter claim be the subject of an independent action under Division Court Rule 108.

John Greer, for the motion. *Frost*, contra.

Idington, J.]

BANK OF HAMILTON v. SCOTT.

[May 4.]

Judgment creditor—Examination of judgment debtor—Assignment for benefit of creditor.

The fact that the judgment debtor made before judgment obtained an assignment for the benefit of his creditors, and was examined under such assignment under the provisions of R.S.O. 1897, c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine him under Con. Rule 900.

Rose, for plaintiff. *Kilmer*, for judgment debtor.

COUNTY COURT—LEEDS AND GRENVILLE.

REX v. WENDLING.

Liquor License Act—Resolutions of License Commissioners—Unreasonableness—Ultra vires.

Held, that a resolution of License Commissioners against erecting or allowing to remain erected screens, blinds or other obstructions preventing a view of the bar room from the public street, and imposing a penalty of from \$10 to \$50 for every day which it was allowed to remain is ultra vires of the License Board, inasmuch as the penalty was in excess of the powers of the License Board, and because it was unreasonable.

[Brockville, July 28, 1903. McDONALD, Co. J.]

Appeal from a conviction made by Joseph Deacon, Police Magistrate, for the town of Brockville, on June 30, 1903. The defendant was tried for a breach of a resolution of the License Commissioners, providing that "there shall be no screen, blind, unnecessary partition, or other obstruc-

tion erected, or allowed to remain erected upon any licensed premises which does or shall in any way prevent the bar room from being open to view from the nearest public street, and any person who shall erect or allow to remain erected any such obstruction, or curtain, and infringe upon this regulation shall be liable to a penalty of not less than \$10, and not exceeding \$50 for every day during which such obstruction or curtain shall remain erected or placed." It appeared from the evidence at the trial that the defendant, a license holder, allowed the blinds of his bar room to remain on his windows, the license inspector having observed them on several days. Several witnesses testified that the exposure of the bar room to the light and heat of the sun was injurious to the liquors—and that at least four bar rooms in Brockville were so arranged as not to be seen from any public street. The defendant was convicted and fined \$10 and costs. The defendant appealed to the county Judge in Chambers.

Haverson, K. C., for the appellant. The resolution is ultra vires of the License Board. Sec. 4 of the License Act authorizes the passing of resolutions, and the imposition of penalties for their infraction. Under s. 100, "such penalties may be recovered and enforced in the manner and to the extent that by-laws of municipal councils may be enforced under the authority of the Municipal Act under s. 702 of that Act. By-laws may be passed by municipal councils for inflicting reasonable penalties not exceeding \$50, exclusive of costs, for any breach of any of the by-laws of the corporation." The offence under the resolution is erecting or allowing to remain erected. It is one act, and no matter how many days it is allowed to remain it is one offence, if for six days the penalty in such case would be from \$60 to \$300, a sum beyond the power conferred by ss. 100 and 702 respectively. *Paley on Conviction*, 207. *Reg. v. Scott*, 4 B. & S. 368; *Collins v. Hopwood*, 15 M. & W. 459; *Attorney-General v. McLean*, 1 H. & C. 750; *McCutcheon v. Toronto*, 22 U.C.R. 613.

For the distinction between separate penalties and those of a cumulative character many instances can be cited in the License Act. For separate penalties see ss. 57, 59, 68, 75, 78, 85, 124 and 125; for those of a cumulative character see ss. 47, 71 and 77.

The resolution is unreasonable in that it requires the license holder, a tenant, to interfere with permanent partitions in a house not his own. Its operations are confined to houses with their bars facing a public street and not to those not so placed.

M. M. Brown, contra, cited *Reg. v. Martin*, 21 A.R. 145; *Queen v. Hodge*, 9 Ap. Cases 117; *Reg. v. Waterhouse*, L.R. 7 Q.B. 545; *Wentworth v. Mathieu*, 3 Can. Crim. Cases 429.

McDONALD, Co. J.—In my judgment the resolution of the License Commissioners cannot be upheld.

In the first place it is ultra vires. I have come to this conclusion with some hesitation, and content myself with referring to the Liquor License Act, ss. 4, 5, 100; the Municipal Act, 702; the sections of the Liquor Li-

cense Act and the authorities cited by counsel. To these may be added *Reay v. Gateshead Corporation*, 55 L.T. 92.

In the second place the resolution cannot be upheld, owing to unreasonableness. In addition to cases cited by counsel, I have been able to examine many others bearing upon this branch of the case.

In *Burnett v. Berry*, L.R. 1 Q.B.D. 643 (1896), Lord Russell, of Killowen, says:—"Authorities cited on the construction of other by-laws are of very little use in assisting the Court to decide whether the particular by-law before them is, or is not, good. Each must be judged by its own language, and having regard to the circumstances to which it is addressed. And from a consideration of reported cases in which the validity of by-laws is the question concerned one sees that Lord Russell is not alone in his opinion.

In Comyn's Dig. vol. 2, p. 309, it is said C. 6, "A by-law not reasonable in any respect will be void," and C. 7, "A by-law being entire, if it be unreasonable in any particular, shall be void for the whole; or if the penalty be unreasonable." The dictum of Lord Kenyon, in *The King v. Company of Fishermen*, 8 Durnford & East, T.R. 356 is "a by-law may be good in part, and bad in part, yet it can be so only when the parts are entire and distinct from each other." In American and English Encyclopædia of Law, 2nd ed., p. 97, "A by-law must be reasonable." It is a governing rule, with regard to corporations, that their by-laws must be reasonable and such as are vexatious, oppressive, unreasonable and opposed to common right are inoperative and void." At p. 100: "By-laws to be valid must be certain, must be directed against all within the sphere of their operation, and must operate equally."

In *Kruse v. Johnston*, L.R. 2 Q.B.D. (1898), 91, which was heard before a specially constituted court, Lord Russell, at p. 99, drew a distinction between by-laws of bodies of a public representative character entrusted by Parliament with delegated authority and those of railway companies, dock companies, or other light companies which carry on business for their own profit although incidentally for the advantage of the public, and speaking of the latter class, he says: "In this class of case it is right that the courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies, clothed with the ample authority which I have described, and exercising the authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported, if possible. They ought to be as has been said benevolently interpreted, and credit ought to be given to those who have to administer them, that they will be reasonably administered. This involves the introduction of no new canon of constitution. . . . I do not mean to say that there may not be cases in which it would be the duty of the Court

to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say "Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires," but it is in this sense, and this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. And in this connection see *Strickland v. Hayes*, L.R. 1 Q.B. (1896) 290; *Gentel v. Rapps*, L.R. 1 K.B. (1902) 160, and *Thomas v. Sutter*, 1 Ch. Div. (1900) 10.

The legislature of Ontario has in respect to the enactment of resolutions or the regulation of many matters connected with the liquor traffic virtually clothed the License Commissioners with legislative powers, within certain limitations, and the remarks of Lord Russell in *Kruse v. Johnston* above quoted, seem to be applicable in considering resolutions passed by them. Considered from that point of view is the resolution now in question a reasonable one? It seems to me it is not.

I am not much impressed with the evidence offered by the appellant in support of his theory as to the injury caused to his liquor by exposure to sunlight, and as to his inability, owing to the narrowness of his bar room to remedy the difficulty. Nor can the resolution be considered unreasonable because the publicity given to a bar room by virtue of it would prevent people who wish to drink quietly and away from the public eye from frequenting it. But when owing to the resolution being "partial in operation" these people find licensed houses not affected by it as is that of the appellant and hence give him the go by he may not unfairly put it forward as a ground in favor of his appeal.

It has been clearly shewn, and is not disputed, that the resolution now under consideration is not applicable to and does not affect four out of the ten licensed houses in the town of Brockville. Thus it is not directed against "all within the sphere" of its operations, and does not "operate equally." The other six licensed houses are saddled with requirements and restrictions from which the four above-mentioned are free.

Surely this is unreasonable. Had the resolution been so framed as to cover all the licensed houses it would, subject to the question of validity as to the penalty enacted for the breach of it, have been valid. And there is not any reason given why it could not have been so framed. For instance had it provided that in every licensed house the bar room must face upon and open into a public street, and that no screen blind, etc.,

should be erected, etc., it would have been impartial in application. For such an enactment or resolution a precedent may be found in an Act of the legislature of Prince Edward Island, passed in 1892, enacting police regulations concerning the drink traffic in Charlottetown, some of which were that in places in which liquor was sold must be a front room with large windows facing the street; that such place must have but one door, and that door open on the public street; that there should be no screen or curtain at the window, and no stalls or other partitions within the place. This enactment was made for a city in which there was neither prohibition nor license. Had the resolution now under consideration been framed similarly it would have affected all equally and been impartial in operation.

It is not out of place to observe that owing to four of the license houses being free from possibility of compliance with the resolution, the community does not as to those obtain what the learned police magistrate appears to have considered would be the beneficial effects of the resolution, viz., opportunity for readily observing "from the street whether the licensee is, or is not, selling contrary to law."

See *London & Brighton R. Co. v. Watson*, L.R. 4 C.P.D. (1879) 111; *Dyson v. London & N.W.R. Co.*, L.R. 7 Q.B. (1881) 32; *Saunders v. South Eastern R. Co.* L.R. 5 Q.B.D., 463; *Alty v. Farrell*, L.R. 1 Q.B. (1896) 636; *Hanks v. Bridgman*, ib. 253; *Lowe v. Volp*, ib. 256; *Simmons v. Malting Rural District Council*, L.R. 2 Q.B. (1897) 433; *Kinnaird v. Corry & Son*, L.R. 2 Q.B. (1898) 586. *Elwood v. Bullock*, Q.B. 383; Ad. & El. N.S., 383. *Jonas v. Gilbert*, 5 S.C.R. 356.

The appeal is allowed and the conviction quashed.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

KING v. KING.

[March

Court of divorce and matrimonial causes—Jurisdiction of Judge Ordinary—Restitution of conjugal rights—Alimony pendente lite—Constitution of Appeal Court—Act of 1886, c. 49, s. 3, held intra vires, provincial legislature.

The jurisdiction of the Court for Divorce and Matrimonial Causes extends to all matters relating to prohibited marriages and divorces and includes the same powers in respect of, or incidental to divorce or matrimonial causes, as are possessed by the Court in England, except as enlarged, abridged, altered, or modified, by the laws of this province. The Judge in Ordinary has power to hear and decide a suit for restitution of conjugal rights, and has also jurisdiction, if necessary, to grant alimony pendente lite. An appeal from the order of the Judge in Ordinary, granting alimony pendente lite, was heard before four Judges of the Supreme Court, including the Judge in Ordinary.

Held, dismissing the appeal with costs, that the Court was properly constituted, and that s. 3 of c. 49 of the Acts of 1886, repealing the words of s. 10, c. 126 R.S. App. (a) "of whom three, at least, in addition to the Judge Ordinary shall form a quorum" was within the jurisdiction of the local legislature of Nova Scotia.

B. Russell, K.C., and *S. E. Gourley*, for appeal. *F. A. Lawrence*, K.C., and *H. Mellish*, K.C., contra.

Full Court.]

MCDONALD v. MILLER.

[March 8.

Partnerships—Dissolution—Contract for exclusive right to use firm name—Injunction to restrain violation—Colorable imitation calculated to deceive.

Plaintiff and defendant dissolved a co-partnership which had been carried on by them for some years as dealers in pianos, organs and sewing machines under the name and style of M. Bros. & M. In consideration of the sum of \$9,000 paid by plaintiff to defendant the latter assigned to plaintiff all his right, etc., in said business and the right to use the firm name, and covenanted that plaintiff alone or with others should have the right to carry on business under the name of M. Bros. & M., and that defendant would not in any way interfere with the use of such name by plaintiff. Defendant subsequently commenced business under the name of M. Bros. & Co. and published an advertisement soliciting old customers of the firm of M. Bros. & M. in such a way as to lead such customers and the public to believe that in dealing with him they were dealing with the old firm.

Held, 1. Affirming the judgment of the trial judge that the name adopted by defendant was calculated to deceive persons into the belief that they were dealing with plaintiff; that it was a colorable imitation of the name under which plaintiff was doing business, and that it was a violation of the contract that defendant would not in any way interfere with the use of such name by plaintiff.

2. The advertisement published by defendant addressed to his "old customers" as well as to any new ones who may favor me with their patronage," in which he stated that he had merely sold his interest in the retail store in H. and that he would still continue to wholesale pianos, etc., from his warehouse there, contained misrepresentations and concealments and was calculated to deceive the public into the belief that he represented the business of the old firm.

3. Plaintiff was entitled to an order restraining defendant from using the name adopted by him and from soliciting the old customers of the firm.

R. E. Harris, K.C., for appeal. *W. B. A. Ritchie*, K.C., and *J. L. Mackinnon*, contra.

Full Court.]

MORTON v. JUDGE.

[March

Contract—Part performance—Accord and satisfaction.

On the trial of an action brought by plaintiff for balance of price of goods sold and delivered defendant proved an agreement between plaintiff and defendant subsequent to the date of sale whereby defendant, in consideration of the goods sold and delivered by plaintiff, agreed to prepare and deliver to plaintiff a monument or headstone of the value of \$20, and to prepare and deliver to plaintiff a second monument or headstone of the same value at any time when plaintiff required the same. The agreement was carried out in part by the delivery to plaintiff of the first mentioned stone, but the second stone was not delivered in consequence of some difference between the parties as to the size of the stone required.

It was contended for defendant that the agreement was in accord and satisfaction of the plaintiff's claim for goods sold and delivered, and that the plaintiff could only claim under the agreement for damages for breach of contract, and also that as the agreement set out as the consideration for the goods supplied the promise of delivery of the headstones was binding in writing it could not be varied by parol evidence of any sale, and that the contract was one of barter, not sale. It was contended for plaintiff that the performance of the agreement alone could constitute accord and satisfaction, and that until performance there was no consideration for the agreement, and that the plaintiff could claim under the original cause of action for goods sold and delivered.

Held, reversing the judgment of the county court judge and dismissing the action with costs, that the agreement entered into and partly executed was a complete accord and satisfaction of plaintiff's original cause of action, and that the plaintiff's only remedy was for breach of contract, as defendant had not carried out terms of the agreement.

T. R. Robertson, for appeal. *J. J. Ritchie*, K.C., contra.

Townshend, J.]

REX v. SWAN.

[May

Canada Temperance Act—Third offence—Failure to shew commission of offence after information for first offence—Affidavit shewing compliance with statutes properly received—Conviction in Form VI., Dominion Acts, 1888, c. 34, s. 14, sufficient—Omission to state that second and third convictions were for separate offences.

Defendant was convicted by the Stipendiary Magistrate of the town of Springhill, on the 7th April, 1904, for unlawfully selling intoxicating liquors within said town between the 15th day of March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act then in force in and throughout the said county of Cumberland, the said conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application

for a writ of certiorari the chief point argued was that it did not appear from the conviction that the offence for which defendant was convicted was committed after an information laid for the first offence as required by R.S.C. c. 106, s. 115, sub-s. (d). Affidavits were read in reply, shewing, that although it was not so stated in the conviction, such, in fact, was the case.

Held, 1. The affidavits were receivable.

2. The provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in Form V., provided by Dom. Act, 1888, c. 34, s. 14, was sufficient. *The Queen v. Brine*, 33 N.S.R. 43, and *The Queen v. Ettinger*, 32 N.S.R. 181 referred to.

3. It did not invalidate the conviction that it did not therein appear that the second and third convictions were for separate offences. Motion dismissed with costs.

J. B. Kenny, for prisoner. *J. J. Power*, for Inspector.

Townshend, J.] REX v. BOUTILIER. [May 6.
Liquor License Act—Warrant and information—Failure to shew offence within six months.

To an order in the nature of a habeas corpus for the discharge of defendant, a prisoner confined in the common jail at H., the jailer returned a warrant signed by the Stipendiary Magistrate for the county of H. reciting a conviction under the Liquor License Act, made against defendant "for that he the said L. B. within the space of six months, *last past*, and previous to the information herein, which information is dated and laid on April 22, 1904 . . . did sell liquor by retail without the license therefore by law required, etc."

Held, that defendant was entitled to his discharge, it not appearing from the warrant that the offence charged was committed within six months before the laying of the information.

J. J. Power, for prisoner. *T. Notting*, for Inspector.

Province of British Columbia.

SUPREME COURT.

Irving, J.] MILTON v. DISTRICT OF SURREY. [Feb. 17.
Costs—Appeal—Costs of negotiations.

Appeal from taxation of costs. After an appeal was opened it stood over at the suggestion of the Court in order to give the parties an opportunity to settle: the negotiations for settlement were unsuccessful and the appeal was ultimately dismissed with costs.

Held, that the successful party was entitled (1) to a counsel fee (under

item 224 of the tariff of costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 224 of Schedule No. 4.

R. L. Reid, for appellant. *W. J. Whiteside*, for respondent.

Full Court]

LOVE v. FAIRVIEW.

[April 18.]

Fire escape Act—Neglect of statutory duty—Injury to guest while rescuing fellow-guest from fire—Contributory negligence—Volenti non fit injuria—Misdirection—New trial.

Appeal from judgment of HUNTER, C.J., dismissing plaintiff's action for damages for injuries sustained in a fire in defendant's hotel while he was a guest in it.

Held, where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor notwithstanding that a penalty is imposed for breach of the statutory duty.

The defence arising from the maxim *volenti non fit injuria* (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty.

The fact that the guest delayed his exit in order to rescue a fellow-guest, and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence:" whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident was for the jury to decide.

Judgment of HUNTER, C.J., set aside and new trial ordered, IRVING, J., dissenting.

Davis, K.C., for plaintiff, appellant. *Bodwell*, K.C., for defendant, respondent.

Book Reviews.

The Law and Practice Relating to the Formation of Companies. With forms and precedents. By VALE NICOLAS, Barrister-at-law. Second edition. London: Butterworth & Co., Temple Bar; 1904.

This is one of the many books on Company law, but is confined to the formation of companies. Whilst the difference between our statute law on this subject and that of England renders much of the information given of but little service in this country, there are some chapters which will be as useful for reference here as there, such as the promotion of

companies, misrepresentation in prospectuses, the fiduciary position of directors, etc.

Mosley and Whiteley's Law Dictionary. Second edition. By West and Neave. London: Butterworth & Co., Toronto: Canada Law Book Co., 1904.

A compact and excellent dictionary, especially useful to students and beginners. It contains also a catalogue of all the English law reports which have appeared up to the present time, giving the periods over which they extend and the abbreviations by which they are usually referred to. This alone is worth the price of the book.

Courts and Practice.

JUDICIAL APPOINTMENTS.

NOVA SCOTIA.

Mr. Justice J. Norman Ritchie, of the Supreme Court of Nova Scotia, died on the 5th inst. after a short illness, at the age of 70 years. His father, Hon. Thomas Ritchie, and his half-brother, Hon. J. William Ritchie, were also judges. He was looked upon as one of the ablest members of the Nova Scotia Bench. Chief Justice McDonald having resigned there are now two vacancies in the Supreme Court to fill. It is understood that Mr. Benjamin Russell, K.C., M.P., will take the Chief Justiceship. A better appointment could not be made.

ONTARIO.

Mr. Adam Johnstone, of the town of Morrisburg, Barrister-at-law, to be Junior Judge of the United Counties of Prescott and Russell.

RULES OF COURT—ONTARIO.

It will be a great convenience to many readers to publish for easy reference a complete copy of the various Rules of the Supreme Court of Judicature for Ontario passed since the Consolidation of the Rules in 1897. They are as follows:—

1225. Rule 401 is repealed and the following substituted therefor:

The time allowed to a party served out of Ontario to apply to discharge the order shall be that limited by the order allowing the service to be effected.

56. (2) From and after the 1st day of October, 1898, interest shall not be credited in any action or matter in respect of moneys paid into Court (1) with a defence; (2) as security for costs of an action, or appeal; (3) as security for debt or costs, to stay execution; (4) as a deposit for sale in mortgage actions; (5) as a condition imposed by any injunction order; (6) as proceeds of sale in, or to abide the result of, interpleader proceed-

ings; or (7) for any other merely temporary purpose unless or until after the same shall have been in Court six months, and then only at the rate of 2 per cent. per annum, not compounded in any case; but the President, in his absence the next Senior Judge of the High Court, may, for special reasons, order that in any particular case, interest shall be allowed on such moneys at any higher rate not exceeding $3\frac{1}{2}$ per cent. per annum.

56. (3) From and after 1st day of October, 1898, the interest to be credited on the Assurance Fund shall be at the rate of $2\frac{1}{2}$ per cent. per annum, compounded as provided by Rule 57.

56. (4) The interest to be credited to suitors' accounts, on all moneys paid into Court after the said 1st October, 1898 (other than for the purposes above mentioned), shall until further or other order be at the rate of $3\frac{1}{2}$ per cent. per annum from the date, as provided by Con. Rule 57.

58. (2) All balances which are or shall hereafter be standing to the credit of any action or matter which have not been, or which hereafter shall not be claimed, before the lapse of ten years from the time when the same became, or shall hereafter become payable out of Court, shall be transferred to the Suspense Account; and the account in such actions and matters, in respect of all moneys so transferred shall be closed, and no further interest shall thereafter be credited thereto in respect of the moneys so transferred; but such transfer is not to prejudice the claim of any person to the payment of any moneys so transferred. Interest shall not hereafter be credited to the Suspense Account in respect of moneys standing at the credit or authorized to be transferred thereto.

66. (2) Mortgages and other securities made to, or invested in the hands of an accountant, in any action or matter, are to be held by him subject to the order of the Court or a Judge; but no duty or liability (save as custodian of the instrument) is by reason of such mortgage or other security being made, given to or vested in him, imposed on the accountant in respect of such mortgage or security or any property thereby vested in the accountant.

1226. Rule 9 of the Consolidated Rules is hereby amended by inserting the words "and Ottawa" after "Toronto" in the 4th line.

1227. Rule 782 is repealed and the following to be substituted.

Where there has been a trial with a jury an application for a new trial, whether made for that relief alone or combined with or as an alternative of a motion under Rule 783, may be made to a Divisional Court, or to the Court of Appeal.

1228. The following is to be added to Rule 783:

3. The foregoing provision of Rule 782 and of this Rule are not to restrict or affect the power of the Court of Appeal to direct a new trial in any appeal where such relief appears just and proper.

1229. Rule 412 is repealed and the following substituted therefor:

Money shall be paid out of Court upon the cheque of the Accountant, countersigned by the Registrar of the Court of Appeal, or in the case of his absence, by the Junior Registrar of the High Court of Justice, this Rule to take effect forthwith without being published in *The Gazette*.

1230. Clause 4 of Sub-Section B of Rule 26 is amended by adding thereto:

When the same shall be transmitted to the central office, to be dealt with under Rule 340.

1231. Rule 341 is hereby amended by striking out the word "Toronto" and the words "or in a Divisional Court" in the second line thereof.

1232. Sub-section 2 of Rule 792 is repealed and the following substituted:

(2) The party making the motion shall not be entitled, unless

leave of a Judge or of the Court, to set it down until the record and exhibits have been, and it shall be his duty to cause them to be transmitted to the central office.

1233. Consolidated Rules 95 and 96 are hereby repealed.

1234. That Rule 347 be repealed and the following substituted :

347. The time for delivering, amending or filing any pleading, answer or other document may be enlarged by consent without application to the Court or a Judge.

1235. That all proceedings under the Mechanics Lien Act, R.S.O., c. 153, shall be legibly endorsed as follows: "In the matter of the Mechanics Lien Act, between A. B., plaintiff, and C. D., defendant."

1236. Rule 56 is hereby further amended by adding thereto following:

5. (5) From and after the 1st day of April, 1902, the interest to be paid on any suitor's account which has been heretofore allowed at four per cent. per annum, is to be three and one-half per cent. per annum, but this rule is not to affect any payments of interest at four per cent. already made on such accounts.

1237. The Finance Committee may, subject to the approval of the Attorney-General of Ontario being first obtained, arrange for the investment of any moneys in Court in first mortgages on lands in the Province of Manitoba.

1238. The costs of and incidental to the proceedings in the Court of Appeal for Ontario, and in the High Court of Justice for Ontario, and in any Divisional Court thereof, for or in relation to the quashing of convictions or orders shall be in the discretion of the Court, and the Court shall have power to determine and direct by whom and to what extent the same shall be paid, whether the conviction or order is affirmed or quashed in whole or in part.

1239. Consolidated Rule 117 is amended by adding to the proceedings and matters which it is thereby provided shall be heard and determined by the Divisional Courts the following: Proceedings for or in relation to the quashing of convictions or orders.

1240. Consolidated Rules 355 and 356 shall not extend or apply to proceedings for or in relation to the quashing of convictions or orders.

1241. Consolidated Rule 1130 shall apply to the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders, whether the conviction or order is affirmed or quashed in whole or in part.

1242. (47) Rule 47 is hereby repealed and the following substituted :

47. (1) A local Judge of the High Court shall in actions brought and proceedings taken in his county, possess the like powers of a Judge in the High Court, in Court or Chambers, for hearing, determining and disposing of the following proceedings and matters, that is to say:

(a) Motions for judgment in undefended actions ;

(b) Motions for the appointment of receivers after judgment by way of equitable execution ;

(c) Application for leave to serve short notice of motion to be made before a Judge sitting in Court or in Chambers ;

(d) Motions for judgment and all other motions, matters and applications (except : (i) trials of actions ; (ii) applications for taxed or increased costs under Rule 1146 ; and (iii) motions for injunction other than those provided for by Rule 46) where all parties agree that the same shall be heard, determined or disposed of before such local Judge, or where the solicitors for all parties reside in his county.

• Provided always that where an infant or lunatic or person of unsound

mind is concerned in any such proceedings or matters, the powers conferred by this Rule shall not be exercised in case of an infant without the consent of the Official Guardian, and in the case of a lunatic or person of unsound mind without the consent of his committee or guardian, and provided also the like consent shall be requisite in the case of applications for payment of money out of Court and for dispensing with the payment of money into Court where an infant, lunatic, or person of unsound mind is concerned.

(2) No order for the payment of money out of Court, or for dispensing with the payment of money into Court, shall be acted upon unless a Judge of the High Court has manifested his approval thereof in the manner provided by Rule 414.

(3) The judgment or order of the local Judge in any of the proceedings or matters in this Rule referred to shall be entered, signed, sealed and issued by the Deputy Clerk of the Crown, Deputy or Local Registrar of the County, as the case may require, and shall be and have the same force and effect, and be enforceable in the same manner as a judgment or order of the High Court in the like case.

1243. (48) Rule 48 is hereby amended by substituting the letter (d) for the letter (c) in the second line.

1244. (139) Rule 139 is repealed and the following substituted therefor:

139. Where a plaintiff's claim is for or includes a debt or liquidated demand, the endorsement, besides stating the nature of the claim, shall state the amount claimed in respect of such debt or demand, and for costs respectively, and shall further state that upon payment thereof within the time allowed for appearance further proceedings will be stayed. Such statement may be according to Form No. 6. The defendant, notwithstanding that he makes such payment, may have the costs taxed, and more than one-sixth be disallowed the plaintiff's solicitor shall pay the costs of taxation.

1245. Form No. 6 (Section 3 of the Appendix) is amended by striking out the figure 8 and leaving a blank space between the words "within" and "days" in the third line, and omitting the words between brackets.

1246. (162) Clause (e) of Rule 162 is hereby repealed and the following substituted therefor:

(e) The action is founded on a judgment or on a breach with Ontario of a contract wherever made which is to be performed with Ontario, or on a tort committed therein.

1247. (300) Rule 300 is hereby repealed and the following substituted therefor:

300. A plaintiff may, without leave, amend his statement of claim whether endorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered, and before the expiration of the time limited for reply, and before replying.

1248. (302) Rule 302 is hereby repealed and the following substituted therefor:

302. Where a plaintiff has amended his statement of claim under Rule 300 the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, which ever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

1249. (414) Rule 414 is hereby amended by adding thereto:

(2) An order dispensing with the payment of money into Court unless it is made by a Judge of the Supreme Court shall not be acted on unless or until a Judge of the High Court has manifested his approval thereof in the manner provided by sub-s. 1.

1250. (439) Rule 439 is hereby repealed and the following substituted:

439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, except as hereinafter provided.

439 (a) In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

439 (b) An examination shall not take place during the long vacation without an order of the Court or a Judge.

1251. (461) Sub-sections 2 and 3 of Rule 461 are hereby repealed.

1252. (881) Rule 881 is hereby repealed and the following substituted:

881. Before the sale of lands under a writ of fieri facias, the sheriff shall publish once, not less than three months and not more than four months preceding the sale, an advertisement of sale in *The Ontario Gazette*, specifying:

- (a) The particular property to be sold;
- (b) The name of the plaintiff and defendant;
- (c) The time and place of the intended sale;
- (d) The name of the debtor whose interest is to be sold;

and he shall in each week, for four weeks next preceding the sale, also publish such advertisement in a public newspaper of the county or district in which the lands lie; and he shall also, for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the county or district is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day.

1253. (1146) Rule 1146 is hereby amended by adding thereto:

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with sub-s. 1, unless it is otherwise expressly provided by the order or judgment, or unless the Court or a Judge of the High Court otherwise directs.

1254. (406) (2) When money is required to be paid into Court to the credit of the Assurance Fund, established under the Land Titles Act, the direction to receive the money, if the same is payable into a bank in Toronto, shall be obtained from the Master of Titles, and if payable into a bank outside of Toronto the direction shall be obtained from the proper Local Master of Titles.

1255. 818 (a) Upon the filing of the order of His Majesty in his Privy Council, made upon an appeal to His Majesty in Council, with the officer of the High Court, with whom the judgment or order appealed from was entered, he shall thereupon cause the same to be entered in the proper book, and all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below.

818 (b) When the judgment of the Supreme Court of Canada in appeal has been certified by the Registrar of the Court to the proper officer of the High Court he shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the High Court. See R.S.O. c. 135, s. 67.

1256. 1157 (a) When the costs incurred in Canada of an appeal to His Majesty in his Privy Council have been awarded, and the same have not been taxed by the Registrar of the Privy Council, the same may be taxed by the senior Taxing Officer, and the taxation shall be according to the scale of the Privy Council.

1257. Rule 413 is hereby repealed and the following substituted :

413. Cheques shall not be issued during the long vacation unless the præcipe therefor is lodged in the accountant's office on or before the 20th day of July, unless otherwise ordered by a judge.

1258. 972 (a) Costs payable out of the proceeds of lands sold under the Devolution of Estates Act, with the approval of the Official Guardian, shall be taxed by the senior Taxing Officer.

972 (b) The Official Guardian shall deposit in the Accountant's office a statement, certified by the proper officer, showing the distribution of the proceeds of lands sold or mortgaged with his approval, and proof of the dates of births of the infants interested.

972 (c) All moneys received by the Official Guardian on behalf of infants, lunatics, absentees or other persons for whom he acts, shall, unless otherwise ordered by a Judge of the High Court in Chambers, be paid into Court.

972 (d) Moneys paid into Court under the next preceding rule to the credit of infants, shall be paid out to them when they attain their majority, or sooner if so ordered by a Judge of the High Court in Chambers.

1259. Rule 99 is repealed and the following is substituted :

99. The business of the Weekly Sittings shall be as follows: Tuesday and Friday, Chambers. Monday, Wednesday, and Thursday, Court.

1260. Rule 1245 is repealed, and the following is substituted for Form No. 6, s. 3 of the Appendix :

(Add to the above forms for money claims in No's. 4 and 5), and the plaintiff claims \$ for costs ; and if the amount claimed be paid to the plaintiff or his solicitor within the time allowed for appearance, further proceedings will be stayed.

1261. 348 (a) Unless the Court or a Judge gives leave to the contrary there shall be at least six (6) clear days, computed as mentioned in Rule 348, between the service of notice of an application for a declaration of lunacy and the day for hearing.

UNITED STATES DECISIONS.

INNKEEPERS—DUTY TO GUESTS—TORT OF SERVANT.—The defendant was the proprietor of a hotel at which the plaintiff and his family were guests. The plaintiff's infant son was injured by the discharge of a revolver, fired by the defendant's servant. It did not appear whether the discharge was accidental or intentional. The plaintiff sued the defendant for breach of contract.

Held, that the defendant was liable for breach of an implied contract to protect his guest: *Clancy v. Barker*, 98 N. W. Rep. 440 (Neb.).

As the act of the servant was clearly outside the scope of his duty, the master would not be liable from the point of view of the law of agency. *Morier v. St. Paul, etc., Ry. Co.*, 31 Minn. 351. But although no decision upon the exact point decided has been found, the result seems to be in accord with the trend of recent cases. Modern decisions tend to hold a carrier liable for all torts of its servants committed against a passenger during the carriage, on the ground that the contract imposes upon the carrier a duty of protection: *Chicago, etc., Ry. Co. v. Flexman*, 9 Ill. App. 250. As an innkeeper bears a somewhat similar relation toward his guests, it would seem that, by analogy, his contract imposes a like duty to protect them. He has been held liable for injuries to his guests caused by third persons, which he might have prevented: *Rommell v. Schambacher*, 120 Pa. St. 579. And the principal case is not without support in imposing upon him an absolute liability for injuries to guests caused by his servants. See *Overstreet v. Moser*, 88 Mo. App. 72.—*Harvard Law Review*.

NEW TRIAL—EXCESSIVE DAMAGES.—The plaintiff obtained a verdict for twelve thousand dollars in an action against the defendant for negligence. At that time the plaintiff had not yet recovered from the accident, and the extent of her injuries depended largely on the result of an operation which could not be determined until a few weeks after the trial. The defendant asked for a new trial on the ground of excessive damages.

Held, that the new trial should be granted: *Searles v. Elisabeth, etc., Ry. Co.*, 57 Atl. Rep. 134 (N.J., Sup. Ct.).

The power of granting new trials, first exercised to prevent injustice, was originally limited by judicial discretion only. Although rules have been developed in practice which, whether embodied in statutes or not, compel the granting of new trials in certain defined cases, the original discretionary power of the courts as to all other cases has not been affected: See *Fine v. Rogers*, 15 Mo. 315. The present decision, in view of its peculiar facts, seems fairly to fall within the latter class. The damages given were not excessive if the plaintiff's injuries were permanent, but to conclude that they were permanent required the assumption of the failure of an operation the result of which was at the time of the trial undetermined. In granting a new trial the court could rely upon no established rule, but it thought that injustice might be done in depriving the defendant of the possible benefit which the ascertainment of the result of the operation might give him, thus resting the case upon the primary reason for granting new trials.—*Harvard Law Review*.

ACCIDENT.—A workman employed in a wool-combing factory, who contracts the disease of anthrax by contact with anthrax bacillus which is present in the wool, is held in *Higgins v. Campbell* [1904] 1 K.B. 328, to

have sustained an "injury by accident" arising out of and in the course of his employment, within the meaning of the workman's compensation act of 1897.

RAILWAYS.—A stipulation in a railway pass that the company shall not be liable to the user "under any circumstances, whether of negligence of agents or otherwise, for any injury to the person," is held in *Northern P. R. Co. v. Adams*, Advance Sheets U. S. 1903, p. 408, to violate no rule of public policy, and to relieve the company from liability for personal injuries resulting from the ordinary negligence of its employees to one riding on the pass with knowledge of its conditions. A stipulation in a free railway pass requiring the user to assume the risk of injury due to the carrier's negligence, is held in *Boering v. Chesapeake Beach R. Co.*, Advance Sheets U. S. 1903, p. 515, to be binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

EVIDENCE OF HANDWRITING.—The right to cross-examine handwriting experts in order to prove their ability is sustained in *Hoag v. Wright* (N. Y.) 63 L. R. A. 163, and it is held to be error to strike out an admission by such an expert that he had been mistaken as to signatures which he had pronounced genuine, although the trial judge might, in his discretion, have excluded an effort to secure such admission in the first instance. The other authorities on examination of witnesses to handwriting by comparison are collated and reviewed in a note to this case.

Flotsam and Jetsam.

Law of Master and Servant. The *American Law Review* in its review of Mr. Labatt's treatise on the law of Master and Servant says: "No other work with which the writer is acquainted, on the subject of Master and Servant, and Employers' Liability is entitled to be mentioned in comparison with this. The work is somewhat prosaic, at times prolix, and the style of the author is sometimes involved and even obscure. But the book is not a mere digest of points extracted from cases. It abounds in thought and suggestion. It will have an important effect upon the development of the jurisprudence of our country. Its author is a philosopher, a thinker, a reasoner, a commentator. His great work is well called 'Commentaries.' But it is not a commentary merely. He has collected and presented all the adjudged cases upon the topics of which he treats, down to a comparatively recent period, between 7,000 and 8,000 in number. Each of these cases has evidently been studied, and many of them have been restudied by him. His work will take and hold the field against all competitors, and will lead from this time on."

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NOS. 13 & 14.

The vacancy in the High Court of Justice for Ontario caused by the death of Hon. Mr. Justice Ferguson has been filled by the appointment of Mr. James Magee, K.C., of London, Ontario. The appointment has been well received in the city where he has been practicing for some thirty-seven years, and we may well assume that he will be a useful addition to the Ontario Bench. Mr. Magee was born in Liverpool, and came to this country in 1855, settling in the Canadian County of Middlesex. He was called to the Bar in 1867, and has practiced in London ever since. In February, 1893, he was made a Queen's Counsel and also appointed County Crown Attorney for the above county.

THE BOARD OF RAILWAY COMMISSIONERS.

A noteworthy evidence of the development of modern business life is the Court—for Court it is—which has its headquarters at Ottawa—the newly-formed Board of Railway Commissioners. The work of this Court is most important, and is of much variety, although its jurisdiction concerns only one branch of the great industries of to-day; yet this branch is one which touches a multitude of others.

We doubt not the members of the Court fully realize their responsibility as holding a judicial position charged with very important duties. Whilst having many matters to decide connected with railway and traffic arrangements and conflicting railway interests, they will also have to stand between these gigantic and influential companies and the public, and will see the necessity of protecting the latter, and individuals therein, from the greed and overbearance too often characteristic of rich and powerful corporations. Railway companies have their rights as well as others, but being largely monopolies there is a strong temptation to act without full consideration of what is due to others, and they are transparently alive to their own interests. Presumably, therefore, those who have to deal with them have the greater need of protection.

We doubt if even the Dominion Government, which constitutes the Board, has yet realized that it has created a Court of such extended jurisdiction as this Board possesses, and which jurisdiction, if wisely exercised by a tribunal of competent members, will be both a safeguard to the public and a speedy method of settling differences between railway companies, which in the past have been unduly hampered by the cumbrous machinery of the Railway Committee of the Privy Council, now happily defunct. *Requiescat in pace.*

Should there have been any tendency on the part of this new Court to suppose that it was mainly intended for the protection and advancement of railway interests, that thought must have been short lived, and we do not anticipate complaints on this score. If the Board gains the confidence of the public, as we think it will, it is not unlikely that, in the future, additions will be made to the subjects over which it shall exercise jurisdiction.

As to the Chief Commissioner, we are glad that our confidence previously expressed (*ante p. 49*) has already been justified. Of the other two members, Mr. Bernier, like the chief, has had several years' practical experience as a member of the old Railway Committee, and this should stand him in good stead. The third member of the Board, Dr. Mills, has already shown himself to be careful, painstaking and energetic, and his opinion on any question not purely one of law—with which he is not expected to be familiar—will be of increasing value. The Board gives promise of being a strong and able Court.

NO JURY TRIALS IN THE PHILIPPINES.

We confess to a good deal of surprise in reading the recent decision in the Supreme Court of the United States to the effect that in the absence of Congressional enactment therefor American citizens in the Philippines have no right to trial by jury in criminal cases. This is contrary to the English doctrine of the transference of the "birthrights of the subject" where new possessions, lacking effective legal institutions, are acquired by conquest; and, with submission, we think it incompatible with the theory of the great expounders of the American constitution touching the rights of citizenship. It is certainly at variance with all Anglo-Saxon traditions.

It appears that the editors of a certain newspaper in Manilla were prosecuted for criminal libel and convicted. The local court having denied their demand for a trial by jury, an appeal was taken on that ground to the Supreme Court of the United States, and the latter tribunal held that as this right had not been expressly granted to the inhabitants of the Philippines by Congressional legislation the court of first instance had ruled correctly on the demand. The majority of the court consisted of Fuller, C.J., and Brewer, Peckham and Holmes, JJ. Mr. Justice Harlan, however, dissented. In the course of his very able dissenting opinion the latter considers that the judgment of the Supreme Court simply amounts to "an amendment of the Constitution by judicial action." He further says: "As for the commission of the crime of murder, a Filipino, subject to the sovereign power of the United States, may be hanged by the authority of the United States. The suggestion that he may not, of right, appeal for his protection to the jury provisions of the constitution is utterly revolting to my mind and can never receive my sanction. The constitution declares expressly that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' It is now adjudged that that provision is not fundamental in respect of ten millions of human beings over whom the United States may exercise full jurisdiction. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: 'The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned*, shall be by jury.' Such a mode of constitution interpretation plays havoc with the old fashioned ideas of the fathers."

Judge Harlan's views commend themselves to our reason. The opinion of the majority of the court in this case if pressed to its logical boundaries would mean that Congress must expressly legislate in behalf of the Filipinos the whole body of rights and remedies comprising the liberty of the subject. Such a conclusion would lead to a juridical *impasse* until Congress could be persuaded that this conclusion was a correct one, and found time to enact a Filipino code with all the necessary infinitude of detail. Again, we ask, if a man may be indicted for a common law offence in the Philippines without Congressional authorization therefor, why in the name of common sense should he be denied a fundamental common law method of trial upon such indictment?

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

COMPANY—SHARE CERTIFICATE—SEAL OF COMPANY—FORGERY OF DIRECTORS' SIGNATURES—PRINCIPAL AND AGENT—SCOPE OF EMPLOYMENT.

Ruben v. Great Fingall Consolidated (1904) 1 K.B. 650, was an action brought by the plaintiff to compel the defendant company to register the plaintiffs as holders of certain shares of the defendant company, of which the plaintiffs had obtained from the defendants' secretary a certificate of ownership under the seal of the company. The defence was that the certificate, although admittedly under the company's seal, had been issued by the secretary fraudulently for his own purposes, and that the signatures of two directors attached thereto were forgeries. The plaintiffs had advanced to the secretary, who claimed to be entitled to sell the shares, a considerable sum of money, the price of the shares, and had received from him in good faith the certificate in question without any notice of the fraud. Kennedy, J., held that the company were bound by the certificate which had been issued by their secretary in due course, and that the fact that the directors' signatures thereto had been forged was immaterial; he therefore gave judgment for the plaintiffs. The amount involved being very large no doubt the case will be heard of again in appeal.

LANDLORD AND TENANT—LEASE—NEGATIVE COVENANT—COVENANT NOT TO ASSIGN—PROVISO FOR RE-ENTRY.

In *Harman v. Ainslie* (1904) 1 K.B. 698, an appeal was brought from the decision of Wright, J. (1903) 2 K.B. 241 (noted ante vol. 39, p. 666), where he held that where there is a proviso in a lease for re-entry "if the lessor shall commit any breach of the covenants hereinbefore contained on his part to be performed" (there being both affirmative and negative covenants in the lease), such proviso only applies to affirmative covenants and does not extend to breaches of negative covenants, e.g., a covenant not to assign or sublet. This the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) held to be erroneous. The case is important as there were dicta in favour of Wright's view.

**SALE OF GOODS—IMPLIED CONDITION—POISONOUS INGREDIENT—BREACH—
MEASURE OF DAMAGES—SALE OF GOODS ACT 1893 (56 & 57 VICT. C. 71)
SS. 11, 13, 14, SUB-S. 2, 53, SUB-S. 2.**

Bostock v. Nicholson (1904) 1 K.B. 725. In the year 1900 it may be remembered that a number of persons were made seriously ill and some of them died from drinking beer, which on investigation proved to have been contaminated with arsenic. Litigation took place against the vendors of the beer, and the present was an action brought by the plaintiffs, who were manufacturers of brewing sugar, against the defendants who supplied them with sulphuric acid which was used by plaintiffs in the manufacture of brewing sugar. The plaintiffs did not make known to the defendants nor did the defendants know the purpose for which the acid was to be used, but according to the description in the contract the acid was to be commercially free from arsenic. The defendants at first delivered acid in accordance with the contract, free from arsenic, but subsequently without notice to the plaintiffs delivered acid not commercially free from arsenic. The plaintiffs might by the exercise of ordinary care have discovered the presence of arsenic in the acid, but they did not do so and used it in the manufacture of brewing sugar, which they sold to brewers with the result before referred to. The brewers suffered loss in respect of which the plaintiffs were liable to them. The plaintiffs also lost the price of the acid and the value of the goods spoilt through being mixed with the acid; and the goodwill of their business was also injured. Bruce, J., who tried the action, found that there was a valid sale of goods according to the description within s. 13 of the Sale of Goods Act 1893, and that there had been a breach of the implied condition that the goods delivered should correspond with the description, and on the question of damages he held that the plaintiffs were entitled to recover damages, the measure of which was governed by s. 53, sub-s. 2, of the Act, viz., the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty; and applying that rule, he held the plaintiffs entitled to recover (1) the price paid by the plaintiffs for the acid; and (2) the value of the goods rendered useless by being mixed with the poisonous acid. But he considered that they were not entitled to recover anything for the injury to the goodwill of their business which arose, in his opinion, not from the defendant's act in selling the impure acid, but from the plaintiffs own act in selling the impure sugar to brewers for use in brewing beer.

**PRACTICE—EXAMINATION OF JUDGMENT DEBTOR—OFFICER OF CORPORATION—
RETIRED OFFICER—RULE 610—(ONT. RULE 902).**

In *Société Generale v. Farina* (1904) 1 K.B. 794, the Court of Appeal (Collins, M.R., and Mathew, L.J.,) affirmed an order of Phillimore, J., ordering a person who had been, but had ceased to be, a director of the defendant company, to attend for examination as to debts owing to the company and its means of satisfying the plaintiff's judgment. At the time the judgment was signed the party in question had been a director, but he had since resigned, but the Court held that Rule 610 (Ont. Rule 902) entitled the plaintiffs to examine him notwithstanding his resignation.

**LANDLORD AND TENANT—DISTRESS—SALE OF GOODS DISTRAINED—PURCHASE
BY LANDLORD—2 W. & M. SESS. 1, C. 5, S. 2—(R.S.O. C. 342, S. 16).**

In *Moore v. Singer* (1904) 1 K.B. 820, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) have affirmed the decision of the Divisional Court (1903) 2 K.B. 168 (noted ante, vol. 39, p. 616), to the effect that on a sale of goods distrained for rent the landlord is not a competent purchaser, and a sale to him is invalid.

**COUNTY COURT—JURISDICTION—SALE OF EQUITY OF REDEMPTION—COUNTY
COURTS ACT 1888 (51 & 52 VICT. C. 43) S. 67—(R.S.O. C. 55, S. 23 (13)).**

In *The King v. Whitehorne* (1904) 1 K.B. 827, an application was made for a mandamus to a judge of a County Court to hear and determine an action. By the English County Courts Act the County Courts have jurisdiction in actions for specific performance of any agreement for the purchase of any property where the purchase money shall not exceed £500. The action in question was to compel the specific performance of an agreement for the sale of certain leasehold property which was of the value of more than £500, but which was subject to a heavy charge, the purchase money being only £75. The Divisional Court (Lord Alverstone C.J., and Wills and Kennedy, JJ.,) held that as the purchase money was only £75 the County Court had jurisdiction although the value of the property exceeded £500. (See R.S.O. c. 55, s. 23 (13)).

**INSURANCE—LIFE POLICY—WARRANTY NOT TO COMMIT SUICIDE—POLICY FOR
BENEFIT OF THIRD PERSON—CONDITION.**

Ellinger v. Mutual Life Ins. Co. (1904) 1 K.B. 832, was an action on a policy of life insurance. The policy was issued subject to a warranty by the insured that he would not within one year from its date commit suicide whether sane or insane. The policy

was for the benefit of creditors of the insured. During the year the insured, while insane, committed suicide. It was contended by the plaintiffs that the warranty which was contained in the application for the policy (which by the terms of the policy was made a part of the contract) was not a condition the breach of which would avoid the policy, but merely a personal warranty or independent agreement in respect of which the defendants would have a remedy against the insured's estate. Bigham, J., however, held that the clause in question constituted a limitation of the defendants' liability and that in the event which had happened they were discharged from liability.

TIME—COMPUTATION OF TIME—LIMITATION.

Beardsley v. Giddings (1904) 1 K.B. 847, was a prosecution under the Sale of Foods and Drugs Act, and the question was whether it had been brought in time. The Act prescribed that a prosecution shall not be instituted after the expiration of twenty-eight days from the time of purchase. On a case stated by magistrates, the Divisional Court (Lord Alverstone, C.J., and Wills and Kennedy, JJ.) held that the laying of the information, and not the service of the summons, was the institution of the prosecution.

WILL—CONSTRUCTION—PRECATORY TRUST—"I DESIRE."

In re Oldfield, Oldfield v. Oldfield (1904) 1 Ch. 549, the doctrine of precatory trusts was again considered by Kekewich, J., and the Court of Appeal, and practically the same conclusion was arrived at as in *Re Hanbury* (noted ante p. 378). In the present case the testatrix gave all her property to her two daughters equally, "as tenants in common for their own absolute use and benefit," and appointed them her executrices. She however added, "my desire is, that each of my two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments of this my will." Counsel for the son argued that the clause created a trust in his favour, and that the decisions of the Court of Appeal in *In re Hamilton* (1895) 2 Ch. 370, and *Hill v. Hill* (1897) 1 Q.B. 483, and *Re Williams* (1897) 2 Ch. 12, were erroneous, having regard to the fact that the rule laid down by Lord Alvanley in *Malim v. Keighley*, 2 Ves. Jr. 333, that "wherever any person gives property and points out the objects, the persons, and the way in which it shall go, that does create a trust, unless he shews clearly that his

desire expressed is to be controlled by the party, and that he shall have an option to defeat it," was expressly affirmed by the House of Lords. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) however, considered that on the face of the will it was plain that the daughters were to take absolutely, and that the expression of a desire that they should give a third of their incomes to the son was insufficient to cut down that absolute estate or create any trust in the son's favour.

COMPANY—DIVIDEND OUT OF CAPITAL—ULTRA VIRES—ACTION AGAINST DIRECTORS—RETENTION OF DIVIDEND IMPROPERLY PAID.

Towers v. African Tug Co. (1904) 1 Ch. 558, was an action by shareholders on behalf of themselves and all other shareholders of a limited company against the company and the directors for a declaration that a dividend declared by the directors and the payment thereof out of capital were ultra vires and illegal, and to compel the directors to refund the money so paid. Byrne, J., who tried the action, gave judgment as prayed for the plaintiffs and on the defendants' counterclaim ordered the plaintiffs to repay the dividend: but the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) reversed his decision on the plaintiff's claim, because the plaintiffs had received the dividend with knowledge of the facts and had not before action repaid it, and, though at the trial they had offered to refund it, that was held not to entitle them to bring the action, which was therefore dismissed, but the judgment on the counterclaim was left undisturbed.

CONFLICT OF LAWS—SCOTCH SETTLEMENT—HUSBAND AND WIFE—ALIMENTARY PROVISION FOR HUSBAND—MORTGAGE BY HUSBAND OF HIS INTEREST.

In re Fitzgerald, Surman v. Fitzgerald (1904) 1 Ch. 573. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) have reversed the decision of Joyce, J. (1903) 1 Ch. 933 (noted ante, vol. 39, p. 518). The case turned upon a question of conflict between the law of Scotland and England. On the marriage of a domiciled Englishman to a Scotch lady her property, consisting of heritable bonds, which, according to Scotch law are deemed to be real estate, was settled by a settlement in Scotch form under which the husband, in the event of surviving his wife, was entitled to the income of the settled property for life, "all such payments to be strictly alimentary and not liable to assignment or arrestment by creditors;" and, according to Scotch law, if the husband failed to support the issue of the marriage they are entitled to attach the

alimentary provision. The husband survived the wife and mortgaged his life interest under the Scotch settlement. Upon an application by the trustees to determine the rights of the mortgagees as against the husband and the only child of the marriage. Joyce, J., decided in favour of the mortgagees, holding that the provision against alienation of the alimentary provision was inoperative according to English law. The Court of Appeal, however, have held that it is valid and therefore the mortgage void; that although a restraint against alienation by an adult male person is invalid in English law, yet there is nothing in such a restraint against "public order and good morals" and therefore there is no reason why due effect should not be given to the Scotch law under which such a provision is valid. Stirling, J., however, dissented and thought that, although the trustees were bound to pay the income to the husband notwithstanding his assignment, nevertheless the fund when it came to his hands would be bound by his mortgage.

PATENT—INFRINGEMENT—PATENT FOR COMBINATION—SALE OF COMPONENT PART OF PATENTED ARTICLE—INTENTION OF PURCHASER TO INFRINGE—KNOWLEDGE OF VENDOR.

In *Dunlop v. Mosely* (1904) 1 Ch. 612, the Court of Appeal (Willams, Stirling and Cozens-Hardy, L.JJ.) have unanimously affirmed the decision of Eady, J. (1904) 1 Ch. 164, (noted ante, p. 192), that the sale of a component part of a combination, the subject of a patent, to a person whom the vendors know intends to use it for the purpose of infringing the patent, is not an infringement by the vendors.

EXECUTOR—POWER OF EXECUTOR TO COMPROMISE CLAIM OF CO-EXECUTOR—TRUSTEE ACT, 1893 (56 & 57 VICT., c. 53), s. 21—JUDICIAL TRUSTEES ACT, 1896 (59 & 60 VICT., c. 35), s. 3—(R.S.O. c. 129, s. 33—62 VICT. (2), c. 15, s. 1 ONT.)

In *re Houghton, Hawley v. Blake* (1904) 1 Ch. 622, Kekewich, J., holds that even apart from the Trustee Act, 1893, s. 21 (see R.S.O. c. 129, s. 33), an executor has power to compromise the claim of a co-executor against the estate and that where such a compromise has been made, under the Judicial Trustees Act, 1896, (see 62 Vict. (2), c. 15, s. 1, Ont.), if the executor acts "honestly and reasonably" in making the compromise he cannot be called to account as "for a breach of trust."

COMPANY—DEBENTURE—CONDITION THAT DEBENTURE IS TO BE PAYABLE TO REGISTERED HOLDER—ASSIGNOR—ASSIGNEE—EQUITY AGAINST ASSIGNOR—TRUSTEE FOR CREDITORS.

In re Brown, Shephard v. Brown (1904) 1 Ch. 627. A firm which held certain debentures of a limited company, to which the firm was indebted in £1,666, transferred the debentures to a trustee for the benefit of creditors. Part of the property subject to the debentures was the firm's debt of £1,666. The debentures provided that they should be payable to the registered holder thereof without regard to any equities between the company and the original, or any intermediate holder, and that the company should not be bound to enter or take notice of any trust or to recognize any right in any other person. The assignee caused himself to be registered as the holder of the debentures assigned. The action was a debenture holders' action to realize the amount due under the debentures and on the application to distribute the fund realized among the debenture holders, the point was raised whether the assignee was not bound, notwithstanding the terms of the debentures, to bring into account the £1,666, which his assignors owed the company. Byrne, J., held that he was, and that he had no greater rights than his assignors, neither the company nor the other debenture holders having come in under the creditor's deed.

SPECIFIC PERFORMANCE—CONTRACT REQUIRED BY LAW TO BE IN WRITING—PAROL VARIATION OF CONTRACT—STATUTE OF FRAUDS.

In Vezev v. Rashleigh (1904) 1 Ch. 634, an order had been made by consent for the execution of a lease of certain lands by the defendant, which order the plaintiff claimed to have specifically performed. The defendant set up that the parties had subsequently agreed by parol to a variation of the terms of the order. Byrne, J., however, held that although parol evidence is admissible to shew that a contract required by law to be in writing has been rescinded by parol so as to induce the Court to refuse the intervention of its equitable jurisdiction to enforce it, yet parol evidence is not admissible to shew that it has been varied.

ADMINISTRATION—CONTINGENT FUTURE LIABILITIES—EXECUTOR—INDEMNITY—RETENTION OF ASSETS—PRIVITY OF ESTATE.

In re Nixon, Gray v. Bell (1904) 1 Ch. 638, was an action for the administration of the estate of a deceased person. Part of the estate consisted of leaseholds in which the testator was beneficially

interested, though not named as lessee. The executors claimed that a part of the assets should be retained to answer possible contingent future liabilities under the leases, but Byrne, J., held that this ought not to be done unless there is a privity of estate between the executors and the lessors, which there was not in the present case.

RECEIVER—COSTS—INDEMNITY—CHARGES OF FRAUD—COSTS OF DEFENDING ACTION.

In re Dunn, Brinklow v. Singleton (1904) 1 Ch. 648, is a case which seems to shew that a person undertaking an office of trust may incur liabilities in respect of his fiduciary character, for which he may not be entitled to indemnity out of the trust estate. In this case a receiver had been appointed in the action, and an action was brought against him, charging him with fraud in his character of receiver. He successfully defended the action and it was dismissed with costs, which he was unable to recover from the plaintiff. These costs he now claimed to be paid out of the estate of which he had been appointed receiver: but Byrne, J., came to the conclusion that the guiding principle on which receivers are entitled to indemnity against costs incurred by them in defending actions is, that the defence of the action was for the benefit of the trust estate. Here the charges against the receiver were personal, and the defence of the action being of no benefit to the estate the receiver's claim to indemnity was rejected.

VENDOR AND PURCHASER—PURCHASER'S INTEREST IN LAND—JUDGMENT CREDITOR OF PURCHASER—RECEIVER OF PURCHASER'S INTEREST—NOTICE—RESCISSION OF CONTRACT ON MONEY PAYMENT TO PURCHASER.

In *Ridout v. Fowler* (1904) 1 Ch. 658, the plaintiff recovered a judgment against one Green, who had entered into a contract with the defendant to purchase certain lands for £2,850 and had paid £300 as a deposit and been let into possession of the property. The plaintiff in August, 1902, obtained an order, appointing himself, on giving security, receiver of Green's interest in the land under the contract of sale. He gave notice of this order to the defendant in August, 1902, but did not perfect his security as receiver until May, 1903. In March, 1902, the defendant had given notice to Green, rescinding the contract and forfeiting his deposit, and in May, 1902, Green had commenced an action

against the defendant, claiming a return of the deposit, in which the defendant counterclaimed for specific performance. In January, 1903, an order was made by consent in the action of *Green v. Fowler* whereby the contract was rescinded and Green, on payment of £110, delivered up possession of the premises to Fowler. After completing his security as receiver the plaintiff brought the present action, claiming a lien on the property for the amount of his judgment. Farwell, J., dismissed the action, holding that under the circumstances the defendant was not a trustee of the land comprised in the contract for Green, and that Green's interest under the contract was not such an interest in land as could be charged by the receivership order, and inasmuch as the plaintiff had not perfected his security until after the compromise, he had no claim against the vendor in respect of the £110.

PUBLIC HEALTH—NUISANCE—SMALLPOX HOSPITAL—QUIA TIMET ACTION—EVIDENCE—INJUNCTION.

Attorney-General v. Nottingham (1904) 1 Ch. 673. This was a quia timet action to prevent the defendant corporation from using a building lately erected by them, as a smallpox hospital, on the ground that so to do would be a public and a private nuisance. The evidence of experts was conflicting as to the possibility of ærial dissemination of the disease for any considerable distance, say for more than 50 feet, and the hospital was distant 51 feet from the nearest highway and there were no residents within a quarter mile radius and it was not contended that there was any consensus of opinion on the point, and Farwell, J., came, therefore, to the conclusion that no case had been made by the plaintiff on that ground, and there was no evidence that the hospital was not properly conducted and he, therefore, held that it was not a nuisance either public or private and refused the injunction. In disposing of the case he had to consider the question of the admissibility of evidence of what had occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, and came to the conclusion that it was receivable on the authority of *Hill v. Metropolitan Asylum* (1879) 42 L.T. 212; (1882) 47 L.T. 29. At the same time he expresses a doubt whether the admission of such evidence is not wrong in principle and calculated to confuse and embarrass the case by raising a number of collateral inquiries on which it is impossible for the Court to pronounce.

GOODWILL—SALE OF BUSINESS—VENDOR SOLICITING OLD CUSTOMERS.

In *Curl v. Webster* (1904) 1 Ch. 685, the defendant had sold a business carried on by him to the plaintiffs, and he subsequently organized a limited company for the purpose of carrying on a similar business, and thereafter solicited custom from some of the customers of his former business for the new company. The action was, therefore, brought to restrain the defendant from soliciting business from his former customers, and the only question was as to the form of the injunction. For the defendants it was contended that it should be limited so as not to prevent the defendant soliciting old customers, who, of their own accord, had become customers of the new company before any solicitation was made to them, but Farwell, J., decided that there should be no such limitation and granted the injunction in general terms, restraining the defendant from soliciting or directing, or suggesting solicitation by travellers, or other agents of the company, of any of the customers of the business sold by him to the plaintiff.

**COSTS—TAXATION—INSPECTION OF PROPERTY IN QUESTION BY CONSENT—
RULE 659—(ONT. RULE 1096.)**

In *Ashworth v. English Card Clothing Co.* (1904) 1 Ch. 702, an inspection of the property in question in the action had been arranged between the solicitors without any order being obtained under Rule 659 (Ont. Rule 1096), and on a taxation of costs the Master had disallowed the costs incurred in the inspection. On appeal, however, to Joyce, J., he held that such costs were properly taxable and considered it would be the worst possible precedent to disallow such costs merely because the inspection was made without an order of the Court being obtained.

COSTS REFUNDED ON REVERSAL OF JUDGMENT—INTEREST.

S.C., p. 704. Another point of practice is dealt with by Joyce, J., concerning the right to interest on costs. The action was dismissed with costs, and these costs were paid by the plaintiff to the defendants with interest to date. The Court of Appeal subsequently reversed the judgment and ordered the costs so paid to be refunded, and the defendants repaid the sum they had received with interest to date. Upon a further appeal, the House of Lords restored the original judgment, dismissing the action, and the

plaintiff repaid to the defendants the sum he had received from them, but without any further interest. Joyce, J., held that the plaintiff was liable to pay interest on the amount refunded from the time he received it from the defendants down to the time he repaid it.

NUISANCE—NOISE—VIBRATION—ELECTRIC GENERATING STATION—INJUNCTION.

Colwell v. St. Pancras (1904) 1 Ch. 707, was an action to restrain a nuisance caused by the erection and operation by the defendants of an electric generating station whereby, owing to the noise and vibration thus occasioned, the plaintiffs were damnified. The station had been erected by the defendants under a provisional order made under a statute, which order, however, expressly declared that nothing therein contained should exonerate the defendants from an action for nuisance in the event of any being occasioned by them. It was admitted that the vibration caused by the defendants' machinery was an actionable nuisance, unless it was excusable as being merely temporary and the defendants alleged that the nuisance could be obviated in time by experiment and alteration of the machinery, and contended that until the machinery was perfected their works were not complete and the action would not lie. Joyce, J., however, was of opinion that the nuisance could not properly be called merely temporary or occasional, and that the plaintiffs were under no obligation to put up with the nuisance occasioned by the noise and vibration of the defendants' machinery until they had succeeded in finding some means of using it without creating a nuisance, and he granted the injunction as asked.

We need scarcely say that the article in our issue of June 1st regarding evidence of accused persons and their privilege as to comment was not intended as a review on the subject, but merely to call attention to the divergent views in Scotland and Nova Scotia. In Ontario, as our readers are doubtless aware, the subject was discussed in *Reg. v. Coleman*, 30 O.R. 93; 2 Can. Cr. Cas. 523, and the rule there settled is the same as in Nova Scotia. The old and the new Scotias differ. We think those of the "Mayflower" and not those of the "Thistle" are in the right.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

— —
SUPREME COURT.
—

Que.] CITY OF HULL *v.* SCOTT. [April 27.
Constitutional law—Navigable waters—Arm of river—Possession—Title.

By the law of the Province of Quebec, as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable in consequence of its connection with the navigable stream unless it be itself navigable or floatable as a matter of fact.

The land in dispute forms part of the bed of a stream, called the Brewery Creek, which was originally a narrow inlet from the Ottawa River, dry during the summer time in certain parts, and whose waters passed over certain lots shewn on the survey of the Township of Hull, and granted by description according to that plan to the defendants' auteur, in 1806, without any reservation by the Crown of those portions over which the waters of the creek flowed. Under that grant, the grantee and his representatives have ever since had possession of the lands on both sides of the creek and of the creek itself. The erection, during recent years, of the public works constructed in the Ottawa River for the improvement of navigation and in the interest of the timber trade, have caused its waters to overflow into the creek to a considerable extent at all seasons of the year. In 1902, the City of Hull obtained a grant by letters patent from the Province of Quebec of a portion of the bed of the creek, as constituting part of the Crown domain, and brought the present action *au petitoire*, for a declaration of title, the Attorney-General intervening for the province as warrantor.

Held, affirming the judgment appealed from (Q.R. 24 S.C. 59):

1. That as the Brewery Creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa River into it could not have the effect of altering the natural character of the creek.
2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.
3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent

of the Crown was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water described in the grant.

Foran, K.C., and *Cannon*, K.C., for appellants. *Aylen*, K.C., for respondents.

Ont.]

EAST HAWKESBURY v. LOCHIEL.

[April 27]

Municipal corporation—Survey—Road allowance—Evidence—Departure from instructions and plan.

The Township of Lochiel forms part of the original Township of Lancaster laid out and partially surveyed about the years 1784 or 1785, and composed of seventeen concessions. Subsequently an eighteenth concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the Township of Lochiel. During the year 1798 the Township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partially surveyed by a deputy provincial surveyor, named Fortune, who returned his plan and field notes without the double line generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury in 1818 a D.P.L.S., named McDonald, planted posts on the ground, but returned the plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury and in the Lancaster boundary, the rectangular form was broken.

Held, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken.

Held, also, that even if the work subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet having regard to the decisions in *Tanner v. Bissell*, 21 U.C.Q.B. 553 and *Boley v. McLean*, 41 U.C.Q.B. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey.

Appeal dismissed with costs.

Leitch, K.C., and *O'Brien*, for appellant. *MacLennan*, K.C., and *Tiffany*, for respondent.

Ex. C.]

THE KING v. KITTY D.

[May 4.

Illegal fishing—Seizure of vessel—Evidence of vessel's position.

The American vessel Kitty D. was seized by the Government cruiser Petrel for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture the evidence was conflicting as to the position of both vessels at the time of seizure, and the local judge in Admiralty decided that the weight of evidence warranted a finding that the vessel seized was not in Canadian waters at the time. On appeal by the Crown,

Held, that as the Petrel was furnished with the most reliable log known to mariners for registering distances and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the Kitty D. and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book, and as the local judge had misapprehended the facts as to the course sailed by the Petrel, the evidence of the officers of the Petrel must be accepted, and it establishes that the Kitty D. had been fishing in Canadian waters and her seizure was lawful. Appeal allowed with costs.

Newcombe, K.C., for appellant. *German*, K.C., for respondent. *Ritchie*, K.C., for United States Government.

Ont.]

RANDALL v. AHEARN & SOPER CO.

[May 4.

Negligence—Electric wire—Trespasser—Evidence—Contributory negligence—New trial.

The Ahearn & Soper Co. had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa and obtained power from the Ottawa Electric Co. For the purposes of the contract wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole and in doing so his hands touched the ends of the tie wire by which he received a shock and fell to the ground being seriously injured. To an action for damages for such injury the Ahearn & Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held that this defence was established and dismissed the action.

Held, reversing said judgment, 6 O. L. R. 619, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract and the evidence did not shew that R. was engaged in the ordinary business of his employers and the case should be retried, the jury having failed to agree at the trial.

A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves which would be furnished on application. R. was not wearing such gloves when he was hurt.

Held, that the mere fact of the absence of gloves was not such negligence on R.'s part to warrant the case being withdrawn from the jury; that as to the Ahearn & Soper Co., R. was not bound by said rules; and that though his failure to take such precaution was evidence of negligence he had a right to have it left to the jury and considered in connection with other facts in the case. Appeal allowed with costs.

Fripp and Magee, for appellants. *Riddell*, K.C., and *Fisher*, for respondents.

Ont.]

MILLER v. KING.

[May 4]

Negligence—Master and servant—Workmen's Compensation Act.

M., proprietor of iron works, had built an engine in the course of his business, and while it was standing on a railway track in the workshop a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate the jury found that the accident was due to the negligence of M. in not having the engine properly braced.

Held, that this finding was justified by the evidence and M. was liable under The Workmen's Compensation for Injuries Act (R.S.O. 1897 c. 160).

Held, also that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employer." Appeal dismissed with costs.

Riddell, K.C., and *G. L. Smith*, for appellant. *Aylesworth*, K.C., and *Stone*, for respondent.

N.B.]

IN RE HENRY VANCINI.

[May 4]

Criminal law—Jurisdiction of magistrate—Crim. Code, s. 785—Constitutional law—Constitution of criminal courts.

By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 (63 Vict. c. 46), the

provisions of said section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada.

Held, that though there are no courts of General Sessions except in Ontario the amending Act is not therefore inoperative but gives to a magistrate in any other province the jurisdiction created for Ontario by s. 785.

Though the organization of courts of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing courts or individuals the duty of administering the criminal law and their action to that end need not be supplemented by provincial legislation. Appeal dismissed without costs.

Crockett, for appellant. *Newcombe*, K.C., for Attorney-General of Canada.

N.B.]

WOOD *v.* LeBLANC.

[May 4.

Title to land—Colourable title—Possession—Statute of limitations—Evidence.

The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title, if open, exclusive and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land, continuously or at intervals, during any portion of such period. Appeal dismissed with costs.

Powell, K.C., and *Teed*, K.C., for appellant. *Pugsley*, K.C., *Masters*, K.C., and *Friel*, for respondent.

N.S.]

MORGAN SMITH CO. *v.* SISSIBOO PULP CO.

[June 8.

Mechanic's lien—Machinery furnished—Contract price.

Under the Mechanics' Lien Act of Nova Scotia, R.S.N.S. (1900) c. 171, a lien for machinery for a mill does not attach until it is delivered and if the contractor for building the mill has then been fully paid there is nothing upon which the lien can operate as by s. 6 of the Act the owner cannot be liable for a sum greater than that due to the contractor.

B., holder of more than half the stock of a pulp company for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill and furnish working capital on receipt of all the bond issue and cash on hand. The offer was accepted and all the stock issued as fully paid up was deposited with a Trust Co. and the cash, his own cheque and the price of five shares handed to B. The stock was sold and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the

mill was constructed. The machinery was supplied by an American company but when it was delivered all the money had been paid out as above.

Held, affirming the judgment appealed from (36 N.S. Rep. 348) that as all the money had been paid before delivery the company was not liable under the Mechanics' Lien Act to pay for the machinery.

Held, also, that s. 8 of the Act which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply as no price for building the mill was specified but the price was associated with other considerations from which it could not be separated. Appeal dismissed with costs.

Pelton, K.C., and *R.V. Sinclair*, for appellants. *H.A. Lovett* and *F.H. Bell*, for respondents.

Ont.]

EWING v. DOMINION BANK.

[June 8.

Estoppel—Forgery—Promissory note—Discount—Duty to notify holder.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for \$2,000 would fall due at that Bank on a date named and asking them to provide for it. The name of E. & Co. had been forged to said note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees.

Held, affirming the judgment of the Court of Appeal, 7 O.L.R. 90. *SEDGEWICK* and *NESBITT*, JJ., dissenting, that on receipt of said notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note and not doing so they were afterwards estopped from denying their signature thereto. Appeal dismissed with costs.

Osler, K.C., for appellants. *Aylesworth*, K.C., and *Milliken*, for respondents.

N.S.]

DOMINION IRON & STEEL CO. v. McDONALD.

[June 8.

Assessment and taxes—Exemption—Railways—Imposition of tax—Date—Municipal Act.

Sec. 3 of R.S.N.S. (1900) c. 73 exempted from taxation "the road, rolling stock....used exclusively for the purpose of any railway, either in course of construction or in operation, exempted under the authority of any Act passed by the legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation but all former assessment acts were repealed by these Revised Statutes so that

it was not "exempted" when the latter came into force. By 2 Ed. VII. c. 25, assented to on March 27, 1902, the word "exempted" was struck out of the above clause and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway.

Held, per TASCHEREAU, C.J., that under the above recited clause the railway was exempt from taxation.

Held, per SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ., that if the railway could be taxed under the Assessment Act of 1900 the rate was not authorised until the amending Act of 1902 by which it was exempt had come into force and no valid tax was, therefore, imposed. Appeal allowed with costs.

Lovett, for appellants. *Borden*, K.C., for respondents.

N.S.]

KNOCK v. OWEN.

[June 8.

Solicitor and client—Costs—Confession of judgment—Agreement with counsel—Overcharge.

A solicitor may take security from a client for costs incurred though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.

A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him.

Held, that though the arrangement was improper it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom. Appeal dismissed with costs.

Wade, K.C., for appellant. *Borden*, K.C., for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J., Teetzel, J.]

[Feb. 11.]

REX v. JOHNSON.

Criminal law—Wilful destruction of fence—Criminal Code, ss. 481 (2), 507—“Colour of right”—Conviction—Jurisdiction of magistrate—Rejection of evidence—Unregistered plans.

The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. By s. 481 (2) there is no Criminal offence under s. 507 unless the act of damages is done “without legal justification or excuse and without colour of right.”

Held, that “colour of right” means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.

Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction.

Held, also, that the convicting magistrate erred in disregarding plans of the locus because they were not registered. Where lots are sold in sections pursuant to plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not.

Tucker, for defendant. *Cartwright*, K.C., for magistrate. *DuVermet*, for complainant.

Boyd, C., Ferguson, J., Meredith, J.]

[Feb. 11.]

REX v. JOHNSON.

Criminal law—Conviction—Motion to quash—Recognizance—Insufficiency—Justice of the Peace—Married woman—Separate estate.

The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.

Semble, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance.

J. E. Jones, for complainant. *H. G. Tucker*, for defendant.

Street, J.] *McIntyre v. London and Western Trusts Co.* [Feb. 23.

Executors and administrators—Administration—Cash on deposit—Rate of interest—Bequest of use of chattels for limited period—Sale of chattels—Interest on proceeds—Land contracted to be sold by testator—State of nature—Right to dower—Payment to widow for release—Compensation of executors—Infants—Contingent legacies—Interest as maintenance.

Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at $3\frac{1}{2}$ per cent. per annum for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees.

Held, that the executors would not have been justified in making long or permanent investments of the money which came to their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, $3\frac{1}{2}$ per cent. while the money was on deposit with the loan company, 4 per cent. for 20 days during which it was invested in a debenture, and 3 per cent. thereafter until it was distributed: *Inglis v. Beaty*, 2 A.R. 453, and *Spratt v. Wilson*. 19 O.R. 28, distinguished.

A part of the will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors at H.'s request, and the proceeds were paid to him.

Held, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account.

The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for \$2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at \$390, which they paid her,

and she released her dower; they then conveyed to the purchaser under s. 24 of the Trustees and Executors Act, R.S.O. 1897, c. 129.

Held, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland firewood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R.S.O., c. 129, to apply the money of the estate in the purchase of a release of the widow's dower, and were entitled to charge the estate with the \$390.

The estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about \$60,000 worth of property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about \$6,500 interest. They managed the estate for a period of a little more than four years, down to the date of a report providing for their remuneration.

Held, that they were not entitled to an allowance upon taking over the estate, but should be allowed $2\frac{1}{2}$ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected and to be collected, and \$100 a year in addition for the first two years, and \$75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus.

The testator bequeathed to his two infant sons \$4,000 each contingent upon their attaining 25 years of age. The only other provision for them was a gift to each of one-tenth of the residuary estate.

Held, that interest as a means of maintenance is payable out of the general residue of an estate upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable.

Aylesworth, K.C., Folinsbee, Hume Cronyn, T. G. Meredith, K.C., Gibbons, K.C., and A. Stuart, K.C., for the various parties.

Trial.—Meredith, C.J. C. P.]

[March 2.

HOLLAND v. TOWNSHIP OF YORK.

Way—Highway laid out by private person—Assumption for public user—Expenditure by township corporation on sidewalk—Non-repair—Negligence—Act of wrongdoers—Relief over.

A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment has been duly made to the persons who built it.

Held, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII, c. 19 (O.) The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person who has been assumed for public user.

The highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road, in order to afford a passage across it.

Held, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants.

Geary, for plaintiff. *Shepley*, K.C., and *Kyles*, for defendants. *Lawrence*, for third parties.

Boyd, C.]

IN RE DUNN.

[March 10.

Will—Construction—Legacies—Abatement—Devastavit.

Testator died in 1878, having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell, and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other

executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated.

Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor.

Simpson, K.C., for administrators. *Riddell*, K.C., for specific legatees *Shepley*, K.C., for estate of John Simpson. *W. N. Ferguson*, for estate of David Fisher.

Boyd, C.,] IN RE OLIVER AND BAY OF QUINTE R.W. CO. [March 11.
Costs—Taxation—Railway Act—Delegation by judge—Review of taxation—Principle of taxation—Items—Desistment—Arbitration.

The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 Vict., c. 29 (D), provided for by ss. 154, 158, is not for the judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the judge.

If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed.

Held, with regard to items in dispute upon taxation:—

1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.
2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.
3. That "instructions for brief" upon arbitration should be allowed.
4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.
5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with.
6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.
7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed: see 6 O.L.R. 543.

Marsh, K.C., for owner and mortgagee. *Middleton*, for railway company.

MacLennan, J.A.] EVANS v. TOWN OF HUNTSVILLE. [April 11.

*Payment out of court—Money paid in as security for costs of appeal—
Surplus—Execution creditor—Stop order—Agreement with solicitors.*

The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of \$200, paid into court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed with costs, was held entitled to payment of the surplus of the \$200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established.

Hewson, K.C., for defendants. *J.E. Jones*, for plaintiff.

Osler, J.A.] WALLACE v. BATH. [April 13.

Court of Appeal—Notice of intention to appeal—Rule 799—Time—Pronouncing or entry of judgment.

A judgment in a mechanic's lien action, tried by a local Master, was signed March 12, but dated Feb. 24, being the day on which the Master had signed a memorandum of his findings, a copy of which he on the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to the costs of the action, but they were disposed of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail.

Held, that the month within which notice of intention to appeal from the judgment must, by Rule 799, to be given, ran from the signing of the judgment on the 12th March.

R. McKay, for plaintiffs. *F.E. Hodgins*, K.C., for Playfair-Preston Co.

Trial—Anglin, J.] BLACK v. WHEELER. [April 15.

Costs—Scale of—Trespass to land—Title—Pleading—Amendment—Terms—Discretion.

In an action in the High Court for trespass to land, of greater value than \$200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence denied both, and asserted title and right to possession in himself, and also pleaded leave and licence. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy and occupation, and expressly admitting both, and withdrawing his own claim to right

of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and licence, and assessed the plaintiff's damages at \$1, for which a verdict was entered.

Held, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court.

Semble, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made.

B. N. Davis, for plaintiff. *Raney*, for defendant.

Street, J.]

LONG v. LONG.

[April 15.]

Trial—Notice of trial—Close of pleadings—Several defendants—Irregularity—Waiver—Delay.

A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it.

A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice.

McBrady, K.C., *W. H. Blake*, K.C., *Harcourt*, and *Slaght*, for various parties.

Cartwright, Master in Chambers.]

[May 18.]

REX EX REL. MOORE v. HAMMILL.

Quo warranto—Mayor and town councillors—"Current expenditure"—Nature of loans for—Borrowing by outgoing council—Relator's motives—Affidavits as to—Costs.

A mayor and five councillors of a town having voted for borrowing money to meet the current expenditure for 1903 in excess of the amount authorized by s. 435 of the Municipal Act of 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation. The same relator then took further proceedings against the mayor and four old councillors on the same grounds to have them unseated again.

Held, in answer to the contention that sums expended for school purposes and debentures, and other special charges, were not "current expenditure"; that the by-laws recited that the loans were to meet "current expenditure," and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers; that the sums borrowed were in the estimates and were part of the current expenditure for 1903, and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated.

Held, also, that a sum of \$5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902 should be taken into account.

Held, also, that the personal motives of the relator had no bearing on the motion or any part of it, and affidavits and counter affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs.

Aylesworth, K.C., and *C. F. Sutherland*, for the relator. *A. G. MacKay*, K.C., contra.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.]

[June 10.

REX v. MANCION.

Justice of the Peace—Conviction—Minute of—Absence of formal entry—Quashing—Costs.

Where a Justice of the Peace convicts or makes an order against a defendant and a minute or memorandum of such is then made the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed.

The Court has jurisdiction by virtue of sec. 119 of the Judicature Act to award the costs of a motion to quash a conviction under the Ontario statute against either the Justice of the Peace or informant. *Rex v. Bennet* (1902) 4 O.L.R. 205, distinguished.

Marsh, K.C., for defendant. *Middleton*, for informant and magistrate.

Street, J.] CAMDEN CHEESE AND BUTTER CO. v. HART. [June 13.

Cheese factories—Arbitration.

By reason of s. 16, R.S.O. 1897, c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between members of a Cheese and Butter Manufacturing Association, and one of the members with reference to a withdrawal of a member unless and until the association forms rules in accordance with sec. 6 of that Act in reference to the expulsion of a member.

H. L. Drayton, for defendant appellant. *D. L. McCarthy*, for plaintiff.

Street, J.] IN RE CURRY AND WATSON'S SETTLEMENT. [June 14.
*Settled Estates Act—Leave to mortgage—Express declaration to contrary
in settlement.*

This was an application by the trustees of a settled estate under R.S.O. 1897, c. 71, for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "Sell, but not mortgage, the trust property or any part thereof."

Held, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of sec. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage.

W. H. Blake, K.C., for applicant. *Harcourt*, for infants.

Boyd, C.] STANLEY v. HAYES. [June 15.

Lunacy—Civil liability of lunatic—Trespass to property.

Under the Common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though being incapable of criminal intent he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to show that while not responsible, it may be, to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong.

Held, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate.

R. Robertson, for plaintiff. *F. J. Palmer*, for defendant.

Trial—Britton, J.] [June 15.

ELGIN LOAN AND SAVINGS CO. v. ORCHARD.

Fraudulent conveyance—Voluntary deed—Creditors.

A grantor in January, 1903, believing himself to be in perfectly solvent circumstances made a voluntary conveyance of property to his daughter. At the time he made the conveyance he owed the plaintiffs \$6,150. He died in August, 1903, when \$5,000 still remained due to the plaintiffs and the deceased left no property out of which the amount could be realized. The plaintiffs now claimed to have the conveyance set aside or decreed subject to the payment of the deceased's debts. At the time of his death the deceased had 345 shares of stock in the plaintiff company, which failed on June 15, 1903. At the time of the impeached conveyance the deceased also owned other property to the value of over \$4,000. At the time the debt to the plaintiffs was incurred the stock of the company was regarded both by the deceased and the company as ample security for their claim.

and was pledged to them for it, and so continued down to the time of the impeached conveyance.

Held, that the action should be dismissed because this was not a case where the necessary consequence of what the deceased did was to defeat or delay his creditors within the meaning of the Statute of Elizabeth, nor was there any evidence of actual intent so to do.

W. K. Cameron, for plaintiffs. *J. M. Glenn*, for defendants.

Idington, J.]

DINI v. FAUQUIER BROS.

[June 16.

Administrator—Right of action—Action before letters granted—Lord Campbell's Act.

This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence as alleged, of their negligence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ in this action issued, but that letters were not actually issued until two days later. The plaintiff never had any personal right or interest in the subject matter of the litigation.

Held, that the action must be dismissed, but without prejudice to the plaintiff bringing another action.

Boulbee, for plaintiff. *Hearst*, for defendants.

Trial—Britton, J.]

DELEHANTY v. MICHIGAN CENTRAL R. W. CO.

[June 16.

Railways—Negligence—Ejection of drunken passenger—Lord Campbell's Act.

The deceased was a passenger on defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily and when near Bridgeburg began to annoy passengers and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the International Railway bridge over the Niagara River; and the deceased who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. The train was only five minutes run from the city of Black Rock and only twenty minutes run from Buffalo, its destination.

Held, that the defendants were liable for damages, inasmuch as the act of the deceased was such as it might reasonably be expected that a

man in his condition would do upon being put off the train when and where he was put off.

German, K.C., and *Petit*, for plaintiff. *Saunders* and *Cattenach*, for defendants.

Boyd, C.]

BROWN v. BROWN.

[June 17.

Dower—Locatee of Crown lands—Bond—Unregistered assignment.

A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage, obtained the patent.

Held, that his widow was not entitled to dower inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son.

A locatee of land transferred all his interest therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office.

Held, that notwithstanding R.S.O. 1897, c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act.

A. Shaw, K.C., for plaintiff. *Aylesworth*, K.C., for defendant.

Trial—Teetzel, J.]

KERR v. MURTON.

[June 18.

Stockbrokers—Dealings on margin—Obligation of broker to sell.

There is no obligation on a broker in the absence of the customer's orders, to sell shares during a falling of market after he has demanded further margins, and received no reply from his customer; and therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer.

Joseph Montgomery, for plaintiff. *R. W. Eyre*, for defendant.

Britton, J.]

ELLIS v. WIDDIFIELD.

[June 20.

Public schools—School sections—Subdivision into—Mandamus.

The Public School Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:—"The Municipal Council of every township (except where Township Boards have been established) shall subdivide the township into school sections so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants here asked

for an order of mandamus commanding the respondents to subdivide the township into school sections.

Held, that there must be some discretion left to a township council as to when the township shall be subdivided; and that even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body has honestly attempted to do their duty; and upon the facts as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of mandamus should be made.

Du Vernet, for applicants. *Browning*, for respondents.

Britton, J.]

STROUD *v.* SUN OIL COMPANY.

[June 21.

Partition or sale—No common title—Easement.

When on an application for partition or sale of lands it was alleged by the defendant and *prima facie* evidence given that he had acquired as to part of the land title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself.

Held, that there being no common title,—no interest in common, no order for partition or sale should be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to get a sale by partition proceedings and thus force the defendants to protect their easement by purchasing, or permit it to be destroyed by sale.

I. Dickson, for plaintiff. *McClemon*, for defendant.

Province of New Brunswick.

SUPREME COURT.

Gregory, J.]

MARYSVILLE BOARD OF HEALTH *v.* McNALLY.

[April 18.

Summary conviction—Offences against Health Act—Conviction charging two offences.

Defendant was convicted by the police magistrate of Fredericton for that he did "unlawfully and wilfully obstruct and interfere with a person employed under the authority of the local board of health of the said town in preventing any person entering into a district there situate and placed under quarantine by said local board of health, and did force an

entrance into said district contrary to the provisions of the Public Health Act."

Held, that the conviction was bad in that it charged two separate offences against the Health Act, in support of one of which (obstruction of the officer) there was not a particle of evidence in the record.

R. W. McLellan, for complainant. *O. S. Crocket*, for defendant.

En banc.]

EX PARTE DEAN.

[June 17.

Order without hearing—Appeal—Certiorari.

The Judge of the Saint John County Court made an order under 59 Vict. c. 28, s. 48, committing the applicant to prison for three months, because, after his arrest in a civil suit in the St. John County Court, he had made an appropriation of property in payment of another debt without paying the debt sued for. The Judge based the order upon evidence, which the applicant had given upon the trial of the action, and not upon any hearing upon the application for the order under the provisions of the Act referred to. The order did not set out the ground upon which it was granted.

Held, on motion to make absolute a rule nisi for certiorari and to quash, that, notwithstanding the provisions of 59 Vict. c. 28, for appeal, a certiorari ought to be granted under these exceptional circumstances.

Held, also, that the order was bad, there having been no hearing of evidence upon the application therefor, and the grounds upon which it was granted not being set out therein.

A. W. McRae, in support of rule. *E. P. Raymond*, contra.

En banc.]

EX PARTE BERTIN.

[June 17.

Liquor License Act—Conviction—Payment of part of penalty—Warrant of commitment—Certiorari.

The applicant was convicted for selling liquor without license contrary to the Liquor License Act, 1896, and fined \$50.00 and \$6.00 costs, in default of which he was ordered to be imprisoned. A few days after the conviction he paid the magistrate the costs. Subsequently the magistrate issued a warrant of commitment, under which the applicant was arrested and imprisoned. The Supreme Court granted a rule nisi for a certiorari and a rule nisi to quash the conviction, and "all the proceedings on which the same was based, and all the proceedings had thereon."

Held, on motion to make the rule absolute,—without deciding as to the legality of the imprisonment under the commitment after the costs had been paid without an offer to pay them back,—that the conviction could not be attacked upon this ground and that certiorari would not lie to remove the warrant of commitment.

Barry, K.C., in support of rule. *J. P. Byrne*, contra.

En banc.]

SCHOOL TRUSTEES v. HAINES.

[June 17.]

School contract—Ambiguity—Parol evidence.

On January 23rd, 1902, S., one of the defendant trustees, requested P. to telephone to the plaintiff and ask her if and on what terms she would teach their school for the balance of the then current school term, which began on January 1 and would end on June 30. P. talked to the plaintiff over the telephone in the hearing of S. Plaintiff said she would go at the rate of \$90 a term, and P. said that as there were five months, or five-sixths, of the term remaining, that would be about \$75 for the unexpired portion. Plaintiff said she would go at the rate of \$90 a term, or \$75 for the balance of the term. S. agreed, and plaintiff went to the district and began teaching on the 2nd of February, and on the 4th of February signed a written contract agreeing to teach the school "during the unexpired portion of the term" ending June 30, 1902, for \$75. This term contained 121 teaching days of which plaintiff's contract covered 100. Clause 4 of this contract provided that "for a term or for any part of a school year the teacher is to receive such a proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term," and clause 5 that in default of written notice it shall continue in force from school year to school year. Plaintiff taught the unexpired portion of the term and was paid the agreed salary. No notice was given by either party, and she went on and taught the next term, which began on July 1 and ended on December 31 following, but which in consequence of certain holidays under the regulations of the Board of Education, contained only 92 teaching days. In the teachers' and trustees' returns sent to the chief superintendent, as required by the School Law, for both terms her salary was stated to be \$180 per year. These returns were sworn to by two of the trustees. When the trustees paid the plaintiff for the short term they claimed she was entitled only to the same rate per day as the first term, viz., 75c., and refused to pay more than that, or \$69 for the term.

In an action brought by her for her salary in the York County Court, evidence of the verbal agreement and of the school returns was received to explain the written agreement in its application to the second term. The trial Judge admitted it upon the ground that the terms of the agreement were ambiguous because of the use of the expression "the unexpired portion of the term" when it came to be applied to a subsequent term under the operation of clause 5. Reading the written agreement and the parol evidence together, he held that the contract was not a contract fixing \$75 as the salary for the unexpired portion of the term, and then a per diem rate based upon that salary for any future term, but a contract for a definite portion of the first term, with a provision that in default of notice it should continue from school year to school year, applicable in all its provisions alike to each subsequent term as to the first term, and that

clause 4 provided only for the deduction from the salary for lost time upon the basis of the number of teaching days in the particular period to which the contract under the operation of clause 5 should apply. The trial Judge held that plaintiff was entitled to the same salary for the same portion of the second term as of the first, i.e., \$75 for five-sixths of the term (which the evidence shewed the unexpired portion of the (first) term in fact was), or \$90 for the whole term. Verdict for plaintiff on this basis.

Per TUCK, C.J., and HANNINGTON and McLEOD, JJ. This appeal from the County Court Judge's judgment must be dismissed with costs; LANDRY and GREGORY, JJ., dissenting.

Gregory, K.C., in support of appeal. O. S. Crocket, contra.

Province of Manitoba.

KING'S BENCH.

Richards, J.]

[April 26.]

BRITISH CANADIAN LOAN CO. v. FARMER.

Description of land—Inner and outer two miles of parish lot—Mistake—Rectification of deed—Possession—Occasional hay cuttings—Interest, rate of—Meaning of "liabilities"—Only six years arrears of interest on foreclosure.

Foreclosure of mortgage by defendant to plaintiffs of land described as "Lots 19 and 20 in the Parish of Headingly, according to the Dominion Government survey thereof, containing by admeasurement 418 acres, be the same more or less," and for rectification of the mortgage so as to make it cover the outer two miles of said parish lots as well as the inner; plaintiffs alleging that such was the intention of the parties at the time the loan was made and that the outer two miles were omitted by mutual mistake.

The acreage of the inner two miles of the two lots was only 223.65, and that of the outer two miles 197.57, or altogether 421.22 acres.

Held, that the case for rectification of the mortgage as asked for was good on the following among other grounds:—

(1). Because the defendant, who was a man of intelligence and education, had signed the mortgage which stated that the property he was conveying contained 418 acres more or less whereas without the outer two miles the two lots only contained 223.65 acres.

(2). The defendant had, three years after the date of the mortgage, asked the plaintiffs to discharge the mortgage as to the right of way of a railway company running to his knowledge only through the outer two miles of the lots, and had arranged that the price of such right of way should be paid by the Railway Company to the plaintiffs in reduction of the debt due under the mortgage.

The payment by the Railway Company above referred to was made in 1885, and was the last payment on account of either principal or interest of the mortgage, and defendant claimed the benefit of the Statute of Limitations. He had left the land in 1892, but claimed that he afterwards continued to hold possession for several years through his brother-in-law, Alfred Fowler, as his tenant. Almost all that Alfred Fowler did was to cut hay on the land. He did not reside on it, and at the same time that he was cutting the hay, Robert Fowler, who cut it with him, was acting under permit from the plaintiffs. The plaintiffs had paid all the taxes on the lands from 1888 inclusive, and the defendant had never paid or attempted to pay any taxes on them since those for 1887. The mortgage was in the usual form under the old system of registration with the statutory provisions for quiet possession to the mortgagees on default and for possession by the mortgagor until default.

Held, following *Bucknam v. Stewart*, 11 M.R. 625, and *Trustees, etc., Co. v. Short*, 13 A.C. 793, that defendant had not been in actual adverse possession for a sufficient length of time to acquire title under the statute as against the plaintiffs.

The remaining questions were as to the rate of interest to be allowed to the mortgagees after default and as to the number of years arrears to be allowed. The principal fell due on 25th May, 1884, and it was provided that the interest at the rate of eight per cent. per annum was to be paid half yearly * * * * till the whole of the principal was paid.

Held, following *Freehold Loan Co. v. McLean*, 8 M.R. 116, and *M. and N. W. Loan Co. v. Barker*, 8 M.R. 296, that, after May 25, 1884, interest was only recoverable as damages and only at the statutory rate and only for the six years prior to the commencement of the action.

Held, also, that, although 63 & 64 Vict. (D.), c. 29, making five per cent. the legal rate, provides "That the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act," the interest for that part of the six years since the passing of that Act should only be allowed at the rate of five per cent. per annum: *Am. & Eng. Encyc. of Laws*, 2nd ed., vol. 16, pp. 1061 & 1062, and cases there cited, followed.

The word "liabilities" in that Act held not to refer to the principal debt, but to the obligation to pay interest as damages.

It is only in an action for redemption, or one in which the question of the number of years arrears of interest to be allowed is to be treated as if the action were one for redemption. That more than six years arrears are allowed on the principle that he who comes into equity must do equity: *Dingle v. Coppen* (1899) 1 Ch. 726; and *In re Lloyd* (1903) 1 Ch. 385, distinguished.

Mulock, K. C., and *Haggart*, K. C., for plaintiffs. *Wilson* and *Affleck*, for defendant.

MCGREGOR v. WITBERS.

[May 19.]

Agreement of sale of land to be paid for by share of successive crops—Assignability—Personal contract.

We have received a note of this case; but if the note correctly states the facts and the finding of the learned Judge we should have thought that the contract was assignable. It seems desirable to wait and see if there is an appeal from this judgment.

ED. C. L. J.

Province of British Columbia.

SUPREME COURT.

Full Court.]

BRIGGS v. FLEUTOT.

[Jan. 25.]

Champerty and maintenance—Void agreement—Parties entitled to take advantage of—Res judicata—Litigation over specific property—Person not a party but supplying funds for litigation—Estoppel by conduct.

Appeal from judgment of MARTIN, J., declaring that defendant was a trustee for plaintiff of an undivided one-fourth interest in two mineral claims.

Held, that the laws of champerty and maintenance, as they existed in England on Nov. 19, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void.

The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement.

Per HUNTER, C.J.: It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and in the event of the latter's defeat claim to fight the battle over again himself. He is not bound to intervene, and if he does not he must accept the result so far as concerns the title to the property.

At the trial plaintiff obtained judgment declaring that defendant was a trustee of an undivided one-quarter interest in two mineral claims: on appeal by defendant plaintiff's interest was declared to be only one-fortieth.

E. P. Davis, K.C., and *R. M. Macdonald*, for appellant. *S. S. Taylor*, K.C., for respondent.

Martin, J.]

DUMAS GOLD MINES v. BOULTBEE.

[March 18.]

Mining law—Transfer of mining claim—Time for recording.

Interpleader issue. Sec. 19 of the Mining Act requires the locator of a mining claim to record it within 15 days if the location is within 10 miles of the recorder's office; one additional day is allowed for every additional 10 miles. By s. 49 of the Act every bill of sale of a mining claim shall be recorded within the time allowed for recording claims. The claimant of an interest in a mining claim seized under an execution on May 18, 1903, relied on a bill of sale obtained by him on Feb. 23, 1903, while in Dawson,

Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until May 22, 1903.

Held, that as the time for recording mining claims, fixed by s. 19 of the Mining Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution.

J. A. Macdonald and A. C. Galt, for claimant. *C. R. Hamilton*, for defendant.

Full Court]. *LASHER v. TRETHEWAY.* [April 26.
Practice—Parties—Action to set aside tax sale deed and for damages against the municipality.

Plaintiff sued to set aside a tax sale deed obtained by the defendant Tretheway, issued in pursuance of a tax sale held by the defendant municipality. The sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessment roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed. The relief sought was a declaration that the deed and the sale were both void, an account from the municipality of taxes unpaid and damages.

Held, affirming an order of IRVING, J., who dismissed an application to have the municipality struck out as being wrongly joined, that the municipality was properly joined as a party defendant.

McPhillips, K.C., for appellant. *McCaul*, K.C., for respondent.

Duff, J.] *RUSSELL v. BLACK.* [May 26.
Costs on County Court scale—Jurisdiction of judge to order.

Judgment for \$227.00. Counsel for defendant asked that costs be allowed on the County Court scale as the action could have been brought in the County Court. By Supreme Court Act, 1903-4, s. 100, the costs of trial follow the event.

Held, that there was no jurisdiction to order costs on the County Court scale.

F. R. Russell, for plaintiff. *F. Higgins*, for defendant.

UNITED STATES DECISIONS.

RESTRAINT OF TRADE:—A combination to fix prices in restraint of trade is held, in *State ex rel. Crow v. Armour Packing Co.* (Mo.) 61 L.R.A. 464, to be properly shewn by acts on the part of several competing dealers in the same line of trade, such as selling at a fixed price, from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them.

Courts and Practice.

JUDICIAL APPOINTMENTS.

James Magee, of London, K.C., to be a Judge of the Supreme Court of Judicature, and a Justice of the High Court of Justice for Ontario, and a member of the Chancery Division of that Court in the room of Hon. Mr. Justice Ferguson, deceased. Gazetted July 2.

His Honor Edward O'Connor, Junior Judge of Algoma, to be a Surrogate Judge in Admiralty of the Exchequer Court for that District. Gazetted July 2.

THE BAR.

Mr. John S. Ewart, K.C., has removed from Winnipeg to Ottawa, and joined the firm of Wyld & Osler as counsel, the firm hereafter being known as Ewart, Wyld & Osler. Mr. Ewart has enjoyed an extensive practice at the Manitoba Bar during the past twenty years, and he brings a ripe experience to his new sphere of labour. As a writer on the more erudite side of legal literature Mr. Ewart has become well known to the readers of the CANADA LAW JOURNAL. He is the author of a work on "Costs" and one on "Estoppel"; at the present time he is engaged upon a treatise on the equitable doctrine of "Election." We extend our best wishes to Mr. Ewart on his return to Ontario, his domicile of origin, and express the hope that both the courts and the printers will be busied by him for a long time to come.

Book Reviews.

The Yearly Digest of reported cases for the year 1903, decided in the Supreme and other Courts of England, edited by G. R. Bell, M.A., Barrister-at-law, London, Butterworth & Co., 12 Bell Yard, Temple Bar, W.C., 1904.

This necessary yearly addition to every library includes a copious selection of reported cases decided in English, Irish and Scotch Courts, with lists of cases digested, overruled, considered, etc., and all statutes, orders and rules referred to. This digest is a continuation of Mr. Beal's work, taken up by the present editor, who follows on the methods of his predecessor. The selection includes several series of reports in addition to the "authorized." The publishers' work is, of course, as usual, done excellently well.

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NOS. 15 & 16.

The recent appointment to the Supreme Court of the North-West Territories indicates that the Government recognizes the utility of placing on the bench of our sparsely settled and growing territories active men who have, to some extent, grown up with the country, although in the older provinces they would be described as of the junior bar. The new judge—Horace Harvey, B.A., LL.B. (Tor.)—was called to the bar of Ontario in 1889, and practised there till 1893, when he removed to Calgary, where he was Registrar of Land Titles from 1896 to 1900, in which year he was appointed Deputy Attorney-General for the Territories. Much of the important legislation during the past few years is said to have been upon his initiative and to have been framed by him in his dual position of Deputy Attorney-General and Law Clerk of the Legislative Assembly. The appointment of Mr. Justice Harvey now gives a sixth judge to the Court. His district is not as yet assigned, but will be some portion of Alberta. We congratulate the new judge on the honour and the bar on having obtained an able and painstaking judge.

BRIBES TO AGENTS.

Dr. Johnson in his celebrated Dictionary defined a "broker" to be "a person who steps in between two parties and robs them both." Possibly the learned Doctor was bent more on framing a telling epigram than an exact definition; at any rate he put in a concise sentence a practice which not only brokers but other agents are prone to adopt alike contrary to their legal and moral duty to their principals, viz., the acceptance of pay from third persons with whom they are employed to negotiate; such payments are euphemistically termed commissions, but the law regards them as bribes.

Although in certain circumstances a broker may legitimately act as agent for two parties to a transaction and receive pay from both, yet it is perfectly clear that the ordinary rule applicable to the relations of principals and agents forbids an agent receiving

pay, commissions or bribes from the person with whom he is employed by his principal to negotiate. For an agent to do so, without the consent of his principal, is a distinct breach of duty. This was well illustrated lately in the case of *Andrew v. Ramsay* (1903) 2 K.B. 635 (see ante p. 111), where the plaintiff recovered from his agent not only the commission he had been paid for his services by the plaintiff, but also the commission he had also received from the opposite part in the transaction in which the defendant had been employed as agent.

The first Ontario case on the subject seems to be *Kersteman v. King* (1879) 15 C.L.J. 141 (County Court, York), in which the Court, anticipating the rule laid down in *Andrew v. Ramsay*, held that an agent employed to purchase land for his principal forfeits his rights to his commission if he receive any remuneration or commission from the vendor.

In the last case however, *Webb v. McDermott* (not yet reported), the principal failed to recover against the agent, because at or about the time of the completion of the transaction (a sale of timber limits) the plaintiffs were informed by the purchasers that the agent was to be paid a commission by the purchasers. In that case we understand it did not appear that the plaintiffs had full and complete information as to what the agent was to receive, or when the bargain had been entered into under which the payment was to be made. The Divisional Court (the Chancellor, and Meredith and Anglin, JJ.) however, thought that the plaintiffs had received sufficient notice to put them on inquiry, and that, not having elected to rescind the contract, after notice that a commission was to be paid by the purchasers, they must be held to have waived the right to object to the agent receiving such commission for his own use.

In the case of *Bartram v. Lloyd*, 90 L.T. 357, recently decided by the English Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.), that Court seems to have considered there could be no binding ratification of a contract effected through an agent who has been bribed except on the fullest disclosure of all material facts. In that case the defendant through his agent contracted with the plaintiffs for the building of a ship for the defendant. The ship was built, and the defendant being unable to pay for it, it was arranged that it should be sold, and that the defendant

should pay the loss arising on the sale. The ship was accordingly sold, and there remained a deficiency of over £7,000. The defendant, being unable to pay this sum, had an interview with the plaintiffs, when he was informed that his agent was claiming a commission from the plaintiffs, and they then pressed him to pay a sum however small on account of the £7,000, and he then paid them £1. This the plaintiffs claimed was a waiver of the right of the defendant to object to the plaintiffs paying a commission to the defendant's agent ; but the Court of Appeal held that it was not, because all the facts were not disclosed to the defendant, and particularly the circumstance that the bargain to pay the agent the commission had been made before the contract was entered into by the defendant, and they held that, notwithstanding all that had taken place, the defendant was still entitled to repudiate the transaction altogether.

That of course was a different case from *Webb v. McDermott*. In both cases, however, the ratification of an illegal act was in question, in the one case notice that the payment was to be made was held to be sufficient to estop the plaintiffs from disputing their agent's right to retain a profit illegally bargained for in fraud of his principals, whereas in the English case, the Court founded itself on the well settled principle that there can be no valid ratification of a contract tainted by fraud which is based on a mere constructive notice of the facts, but that a full and actual knowledge of all the facts is necessary.

The decision in *Webb v. McDermott* seems to us to be unsound, and to undermine the very salutary principle that an agent who bargains for a bribe cannot hold it against his principal without his express consent, after full disclosure of all material facts, and to sanction the idea that agents may successfully bargain for benefits over and above what their principals have agreed to pay them. For even though it be true that the plaintiffs in that case elected not to repudiate the contract after knowledge that a commission was being paid by the purchasers to the plaintiffs' agent, that fact does not really seem to be any ground for denying the plaintiffs' right to say to their agent " the only benefit you are entitled to out of this transaction is what we agreed to give you, and whatever you have received or bargained for over and above that is ours, not yours." The commission paid the agent being in truth

and in fact a part of the price actually agreed to be paid, but surreptitiously abstracted and given to the agent by way of bribe instead of to his principals, and thus a payment to which the agent has no title except with the express consent of his principal after full disclosure of all the facts.

The Divisional Court appears to have assumed that the plaintiffs in *Webb v. McDermott*, when they learnt that a bribe was being paid to their agent, were shut up to the single remedy of repudiating the contract, and that by affirming the contract they necessarily affirmed the payment made by the purchasers to their agent, and deprived themselves of the right to claim the benefit of it.

We very respectfully venture to doubt the correctness of that position. The affirmance of the contract after knowledge of the intended payment of the bribe to the agent would doubtless debar the principal from recovering the bribe from the purchasers, but we fail to see how it affects the right of the principal to recover it from the agent. Too great weight appears to have been given by the Divisional Court to the fact that the plaintiffs had learned that a commission was to be paid by the opposite party to the agent, and they seemed to have considered that the payment must be secret, and only discovered after the contract is closed, to entitle the plaintiffs to recover the bribe from their agent; but the cases would seem to show that the principal may in law say to the purchaser "I adopt the transaction, I know that you are to pay or have paid my agent some bribe or commission, or whatever you choose to call it, but I also know that I have never agreed to his retaining it for his own use, and I know that the law, rightly expounded, will say that I am entitled to recover it from him."

The law on this aspect of the case is, we believe, correctly stated in *Wright on Principal and Agent*, 2nd ed., p. 392, where it is said "If the principal chooses to affirm the contract where the third party has succeeded by bribing the agent in getting him to enter into a disadvantageous bargain, he has two distinct and cumulative remedies. He may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, without allowing any

deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third party first;" and see per Lord Esher, M.R., in *Mayor of Salford v. Lever* (1896) 1 Q.B. 168.

The fact that the bargain is disadvantageous to the principal is not material except on the question of damages; even though it be advantageous the principal is nevertheless entitled to recover the bribe paid to his agent: *Cohen v. Kuschke*, 83 L.T. 102, and see *Harrington v. Victoria Graving Dock* (1878) 3 Q.B.D. 549. In holding that the agent was entitled to retain the bribe against his principals in *Webb v. McDermott* we venture to think the Court not only erred, but gave its sanction to a vicious principle subversive of commercial morality. It appears to us that in such cases the Court should be astute to protect the principal rather than the agent. This acting by an agent for parties with conflicting interests, which by the way is all too common, opens the door to all sorts of fraud and falsehood by agents and the Court should set its face against such a practice.

NEGLIGENCE.

LEAVING UNPROTECTED A LOADED GUN ON THE HIGHWAY.

In the recent Irish case of *Sullivan v. Creed*, Ir. Rep. 1904, 2 K.B.D. 317, the Irish Court of Appeal had to consider whether an injury to the plaintiff was due to the negligence of the defendant in laying aside a loaded gun. It appeared that the defendant on a Sunday morning went out to shoot rabbits, and having loaded his gun put it on full cock. He found no rabbits and did not discharge the gun, but left it loaded and cocked standing against a fence on his lands and beside a stile through the fence, which stile led to a private and short passage to his house from the public road. He then visited some potato fields with a friend, and afterwards entered a cottage and remained there reading a newspaper for some short time. After coming out of the cottage he heard the report of the discharge of a gun. The plaintiff, a boy of sixteen years old, was returning home from mass by the public road, and on his way met Daniel Creed, a son of the defendant, aged fifteen or sixteen, and two other boys. Daniel Creed left them at a gap leading to the defendant's house. The plaintiff and the two other

boys continued along the high road, and had gone about twenty-five yards when he heard Daniel Creed, who had come back to the high road, cry "Hi lads!" The plaintiff looked round, and saw a gun in Daniel Creed's hands pointed towards him. The gun went off; the plaintiff was hit in the eye and lost the sight of it. The son was called as a witness for the plaintiff, and said: "I saw the gun. It was up against the ditch near the gap. I saw it the moment I went through the gap. I was playing with the gun. I did not know it was loaded." No evidence having been called for the defendant, the jury were asked to assess the damages in case the defendant was liable, and these were fixed at £50, but a verdict was entered for the defendant. Kenny, J., who presided at the trial, being of opinion that the defendant was not legally responsible for the act of his son. Upon a motion to enter the verdict for the plaintiff, it was contended that there was sufficient evidence to warrant a verdict in his favour, for it was the duty of the defendant to use reasonable care to prevent any mischief of which there might be a reasonable apprehension. The defendant, on the other hand, contended that the negligence in firing the gun, which was the proximate cause of the injury to the plaintiff, was the act of a third person, and it was a mere accident that this person was the defendant's son. The King's Bench Division (Palles, C.B.; Gibson, J., and Boyd, J., dissenting) ordered that the verdict should be entered for the plaintiff, and their decision was supported by the Court of Appeal. While thinking that the case was on the border line, the learned judges were clearly of opinion that the jury might reasonably come to the conclusion that the defendant, as a reasonable man, ought reasonably to have anticipated the consequences which ensued. The case may be added to many others in the English courts which relate to reckless dealing with firearms, and though each case must more or less depend upon its particular circumstances, we think the decision may be profitably consulted by those who have to consider the liability of persons in possession of dangerous instruments.—*Solicitor's Journal.*

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—CONTRACT BY AGENT IN
NAME OF HIS PRINCIPAL BUT IN HIS OWN INTEREST—LIABILITY OF PRINCIPAL.

In *Hambro v. Burnand* (1904) 2 K.B. 10, the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.) have reversed the decision of Bigham, J. (1903) 2 K.B. 399 (noted ante vol. 39, p. 713). The defendants, other than Burnand, had given written authority to Burnand to underwrite policies, and among others he underwrote a policy guaranteeing the solvency of a certain company which he was personally interested in keeping afloat. The plaintiff did not inquire into his authority when accepting the policy. Bigham, J., came to the conclusion that the principals might under these circumstances repudiate the act of their agent, but as Romer, L.J., points out, if the plaintiff had inquired into Burnand's authority and had seen the writing it would have been hopeless to argue that his principals could afterwards as against persons dealing *bonâ fide* with him, have repudiated his acts done within the limits of that authority, on the ground that he had acted from sinister motives, and the mere fact that they did not inquire into his authority was really immaterial, by so doing they merely ran the risk of his having in fact the authority to enter into the contract which he claimed to have; but having in fact that authority, the plaintiffs, who had acted *bonâ fide*, could not be affected by the fact that the agent in exercising it was actuated by improper motives.

HABEAS CORPUS—JURISDICTION—WRIT OF HAB. CORP. DIRECTED TO PERSON
OUT OF THE JURISDICTION AT DATE OF ORDER THEREFOR—(R.S.O., c. 83,
s. 1.)

In *The King v. Pinckney* (1904) 2 K.B. 84, the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) have determined that there is no jurisdiction to order the issue of a writ of habeas corpus against a person who, at the time of the making of the order, is out of the jurisdiction of the Court. In this case the applicant for the writ was the father of a child in the custody of

her mother who was out of the jurisdiction, and Walton, J., whose attention was not drawn to that fact, made the order and a writ was issued. Subsequently, on appeal, the Divisional Court quashed the writ, but gave leave to issue a new writ which was ordered to lie in the office until there should be an opportunity of serving it within the jurisdiction, but the Court of Appeal held that was unwarranted by the practice on the simple ground that the Court had no jurisdiction to make any order for such a writ as against a person out of the jurisdiction of the Court.

LANDLORD AND TENANT—LEASE OF PUBLIC HOUSE—COVENANT BY LESSEE NOT TO "SUFFER" ANY ACT TO BE DONE TO FORFEIT LICENSE ACT OF SUB-LESSEE—"ASSIGNS."

Wilson v. Twamley (1904) 2 K.B. 99, was an action by landlord against tenant for breach of a covenant whereby the lessee for himself and his "assigns" bound himself not to do or "suffer" any act to be done on the demised premises whereby the license might be forfeited, or its renewal refused. The defendant had sub-let the premises (a public house) and the sub-lessee had permitted acts to be done in consequence of which a renewal of the license was refused. The plaintiffs were assignees of the reversion and the defendants were assignees of the lease, and there was no question that the covenant ran with the land. The only question was, whether the defendant was responsible for the act of his sub-lessee, and the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) held that he was not, and the fact that, owing to the loss of the license, the premises had lost the character of a public house and become an ordinary dwelling, was held not to be a breach of a covenant that no other business than that of a public house should be carried on on the premises.

GAMING DEBT—CONSIDERATION—WITHDRAWAL OF LETTER TO DEBTOR'S CLUB—ILLEGAL CONSIDERATION—BILL OF EXCHANGE.

In re Browne (1904) 2 K.B. 133, although a case in bankruptcy, is deserving of attention. The case turned on the validity of certain bills of exchange which the holder claimed to prove against the bankrupts' estate. The trustee set up that they had been given for an illegal consideration and were null and void. The facts were, that the debtor had had betting transactions with Martingell and £800 was due to him in respect thereof. Martingell brought an action for the £800 in which the debtor set up the

Gaming Act and the action was dismissed. Martingell then wrote to the committee of a club of which they were both members complaining that the debtor had failed to pay his debts of honour. On learning this the debtor applied to Martingell to withdraw the letter and in consideration of his so doing gave him the bills of exchange in question. Buckley, J., held that the withdrawal of the letter was a valid consideration for the giving of the bills of exchange, and that the defence of illegal consideration failed.

SALE OF GOODS—CONTRACT—"ABOUT AS PER SAMPLE"—VARIATION IN QUALITY BETWEEN BULK AND SAMPLE—VALIDITY OF CUSTOM AS TO SALE BY SAMPLE.

In re Walkers & Shaw (1904) 2 K.B. 152, was a case stated by an arbitrator. Barley had been sold under a contract that it was to be "about as per sample," and which contained an arbitration clause. The buyers having rejected the barley for not being up to sample, the dispute was referred to arbitration and the sellers proved before the arbitrator that there was a custom of the London Corn Exchange applicable to such contracts by which the buyer was not entitled to reject for difference in quality unless it was excessive or unreasonable, and was so found by arbitration under the contract. The arbitrator proved that there was a variation in quality from the sample, but that the inferiority was not excessive or unreasonable, and he awarded that the buyers were bound to accept the barley with an allowance in price in respect of the inferiority. Channel, J., held that the custom was good in law, being neither unreasonable nor uncertain nor contrary to the written contract, and he therefore upheld the award in favour of the sellers.

HIGHWAYS—LOCOMOTIVES—STATUTORY PROHIBITION AS TO SPEED OF LOCOMOTIVES—CROWN—PREROGATIVE.

In *Cooper v. Hawkins* (1904) 2 K.B. 164, the defendant was prosecuted for the infringement of a statutory provision regulating the speed of locomotives on highways. The defendant was an engineer in the service of the Crown, and had driven the locomotive on the occasion complained of in the performance of his duty, and the question was whether the statutory provision applied to a servant of the Crown acting in the performance of his duty, the Crown not being expressly named in the Act, and it was held by the Divisional Court (Lord Alverstone, C.J., and Wills and

Channell, JJ.) that the Act did not apply to the Crown or its servants, and therefore that the conviction of the defendant must be quashed, there being no evidence that the defendant was personally liable on the ground of nuisance or improper performance of his duty.

WILL—CONSTRUCTION—CHATELS REAL—RENT CHARGE ISSUING OUT OF LEASEHOLDS—INTESTACY—NEXT OF KIN ESTATE CHARGES ACTS—(R.S.O., c. 128, s. 37.)

In re Fraser, Lowther v. Fraser (1904) 1 Ch. 726. An appeal was brought from the decision of Byrne, J. (1904) 1 Ch. 111 (noted ante p. 190), on which a question not discussed before Byrne, J., was raised. By the will in question made in 1886 the testator gave all his personalty except chattels real to his executors in trust, and he gave all his real estate and chattels except what he had otherwise disposed of by his will to his brother absolutely. In April, 1898, the testator entered into a contract for the purchase of a rent charge issuing out of leaseholds. In July, 1898, the testator made the last of seven codicils to his will, in this codicil he stated that his brother was dead, but he did not revoke the bequest to him or the general bequest of personalty. The testator died in August, 1898, the purchase money for the rent charge not having been paid. The question was raised before the Court of Appeal whether the exception of chattels real had not been made from the general bequest to the executors of the personal estate merely for the purpose of the bequest to the brother who had predeceased the testator, and therefore as the specific bequest of the chattels real had failed, whether they did not fall into the general bequest of personalty, but the Court (Williams, Stirling, and Cozens-Hardy, L.JJ.) declined to accede to that contention, and held that the exception of the chattels real was good for all purposes, and consequently that as to them there was an intestacy; and they affirmed the judgment of Byrne, J., that the rent charge was a chattel real and passed as on an intestacy, and that the next of kin must take cum onere and were bound to discharge the unpaid purchase money.

TRADEMARK—FANCY WORD—TABLOID.

In *Wellcome v. Thompson* (1904) 1 Ch. 736, it was held by Byrne, J., and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) (Stirling, L.J., dubitante) that the word "Tabloid" is a fancy word, and therefore a good trade mark.

ESTOPPEL IN PAIS—LEASE BY MORTGAGOR—AFFIRMANCE BY MORTGAGEE OF LEASE OF MORTGAGOR.

Keith v. Gancia (1904),¹ 1 Ch. 774, was an attempt on the part of the assignee of a mortgagee of a leasehold interest to recover possession of the property from a lessee of the mortgagor, and the question was whether the plaintiff's predecessors in title had not affirmed the lease and estopped themselves and the plaintiff as assignee from claiming paramount thereto. The case is unaffected by the Conveyancing Act, 1881, which enables a mortgagor to make leases in certain cases which would be valid against the mortgagee. The facts were a little complicated, and were as follows:—Gooch being a tenant of premises for sixty years, in 1892, by way of under lease for the unexpired term, less three days, mortgaged them to Neve; the mortgagor afterwards, in 1892, leased the premises for 21 years to Gancia at a yearly rent of £140, which lease contained a covenant not to sub-let without leave of the lessor or her assigns. In 1895 Neve foreclosed the mortgage, but the last three days of the term were not got in by the mortgagee, and Gancia was not a party to the foreclosure proceedings. After the foreclosure Gancia continued in occupation, and paid £140 rent to the mortgagee, and in 1899, with the leave and license of Neve's executors, sub-let part of the premises to one Sinclair. Neve's executors subsequently sold their interest to the plaintiff, who had actual notice of the lease to Gancia and the sub-lease to Sinclair, and the assignment was made expressly subject to the under-lease to Gancia. Gancia subsequently became insolvent, and the plaintiff claimed to recover possession both as against his trustee and Sinclair by title paramount. The case of the plaintiff was very learnedly argued, but Joyce, J., was of opinion that the plaintiff was effectually estopped by the acts of Neve's executors, who had affirmed the lease of Gancia and the sub-lease to Sinclair, and it was not open to the plaintiff to disaffirm either lease.

COMPANY—STATUTE OF LIMITATIONS—DIVIDENDS—REDUCTION OF CAPITAL BY REPAYMENT TO SHAREHOLDERS.

In re Artisan's Land and Mortgage Co. (1904) 1 Ch. 796, was an application by the liquidators of a company being wound up for a declaration that the claims of shareholders in whose favour warrants for dividends had been issued more than six years before

the commencement of the winding-up were barred by the Statute of Limitations, and also that certain shareholders who became entitled to a return of 10s. per share on a reduction of the capital more than six years prior to the winding-up, were also barred. Byrne, J., held that the certificate of the shares being under seal, and referring to the memorandum and articles of association, the money payable to the shareholders thereunder, whether as capital or dividends, constituted a specialty debt to which the twenty years' limitation was applicable.

PRACTICE—ADMINISTRATION—ORDER TO PAY COSTS OUT OF FUND IN COURT—PRIORITY OF ADMINISTRATORS' COSTS.

In re Griffith, Jones v. Owen (1904) 1 Ch. 807, was an administration action in which an order had been made for the payment of the costs of all parties out of a fund in Court, the fund proved insufficient for the payment of the costs of all parties in full, and the administrator claimed to be paid his costs in full in priority to the other parties. Farwell, J., held, notwithstanding the general terms of the order, he was entitled to this priority.

COMPANY—TRANSFER OF SHARES—REFUSAL TO REGISTER TRANSFER OF SHARES—FORM OF TRANSFER.

In re Letheby (1904) 1 Ch. 815, Buckley, J., decided that directors of a company acting under articles which provide that any member may transfer his shares, "but every transfer must be in writing in the usual, common form," cannot properly refuse to register a transfer merely because it omits particulars which, though found in the common form, are in the circumstances immaterial. In this case the transfer omitted the address of the transferor and omitted to state the number of the share. The transferor had only one share in the company, and with the transfer was sent the certificate of the share which showed the transferor's address. These omissions, therefore, the learned judge held immaterial.

LEASE—TENANTS' FIXTURES—FORFEITURE OF LEASE—REMOVAL OF FIXTURES—MORTGAGE OF LEASE.

In re Glasdir Copper Works (1904) 1 Ch. 819. The question in this case was whether certain tenants' fixtures were removable by a mortgagee of a lease after the lease had been determined by forfeiture. The lessee was a limited company, and the lease contained

a proviso that, in the event of the company going into liquidation, the term should cease. The company had issued debentures which constituted a floating charge on all its property, including the leasehold, and a debenture-holders' action had been instituted in which a receiver had been appointed, and he took possession of the premises and obtained leave from a judge to sell the tenants' fixtures, the lessor being represented and not objecting. Subsequently, and before removal of the fixtures, the company entered into voluntary liquidation, whereby the lease came to an end, and the lessor then claimed to be entitled to the fixtures as against the receiver: but Joyce, J., held that, notwithstanding the termination of the lease, the receiver was entitled to a reasonable time to remove the fixtures under the order for sale previously obtained by him, and that his rights under that order could not be defeated by the subsequent voluntary act of the lessee.

ACCUMULATIONS—PAYMENT OF DEBTS—DEBTS PAID OUT OF CAPITAL—PROVISION FOR RECOUPING CAPITAL—ACCUMULATIONS ACT 1800 (THELLUSSON ACT, 39 & 40 GEO. III., c. 98) s. 2—(R.S.O., c. 332, s. 3.)

In re Heathcote, Heathcote v. Trench (1904) 1 Ch. 826. The neat point decided by Eady, J., is that a provision in a will for accumulating income for the purpose of recouping capital applied in payment of debts is not "a provision for payment of debts" within s. 2 of the Thellusson Act (R.S.O., c. 332, s. 3).

SOLICITOR—COSTS—COLLECTION OF RENTS—COMMISSION.

In re Shilson (1904) 1 Ch. 837, is a case that shews that only strictly professional services are properly includable in a bill of costs of a solicitor. Possibly since the abolition of the rule making the cost of taxations between solicitor and client turn upon whether or not a sixth is struck off, the point involved in this case is no longer very material in Ontario. The charges in question in this case were a lump sum by way of commission for collecting rents, Eady, J., held that the solicitor had no right to charge a lump sum if the services were professional, but could only charge therefor by items, and if the work was non-professional then it ought not to be included in the bill. It may be observed that the taxation was had at the instance of a third party. The effect of the decision was to strike the items out of the bill and leave the matter of the solicitor's remuneration for the collection of the rents at large as between the parties.

PRACTICE—COMPROMISE—ABSENT PARTIES—JURISDICTION—RULE 131A.

Saragossa & M. Ry. Co. v. Collingham (1904) A.C. 159, was an appeal from the decision of the Court of Appeal in *Collingham v. Sloper* (1901) 1 Ch. 769 (noted ante vol. 37, p. 496). The majority of the Court of Appeal there held that there was no jurisdiction under Rule 131A to bind absent parties by a compromise order. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) gave no formal judgment, but expressed their dissent from the views of Rigby and Stirling, L.JJ., in the Court below and reversed their decision.

COMPANY—FORFEITURE OF PARTLY PAID SHARES—SALE OF FORFEITED SHARES—CALLS.

In *New Balkis v. Randt Gold Mining Co.* (1904) A.C. 165, partly paid shares in a limited company having been forfeited by the company for non-payment of calls were subsequently sold by the company to the appellants—the certificate delivered to the purchasers stated that they were to be deemed to be the holders of the shares “discharged from all calls due prior to the date” of the certificate. Subsequently a further call was made on the shares and the House of Lords (Lords Macnaghten, Davey, Robertson and Lindley) sustained the judgment of the Court of Appeal (1903) 1 K.B. 461 that the purchasers were liable therefor. The shares in question were for 5s. each on which 3s. 4d. had been paid, the prior call, for non-payment of which the shares were forfeited, was for 1s. 3d., the call made subsequent to the purchase was also for 1s. 3d., the purchasers contended that the call having been once made on the shares could not be made again, but their lordships held that although the purchasers were relieved from all liability for the call made prior to their purchase, they were nevertheless liable to all subsequent calls until the shares should be fully paid up.

ANCIENT LIGHTS—SUBSTANTIAL INTERFERENCE—NUISANCE—LIGHT—ANGLE OF 45 DEGREES—MANDATORY INJUNCTION.

Colls v. Home and Colonial Stores (1904) A.C. 179, is a very important decision on the subject of ancient lights, inasmuch as the House of Lords have reversed the judgment of the Court of Appeal in this case (1902) 1 Ch. 302 and also overruled its decision in the prior case of *Warren v. Brown* (1902) 1 K.B. 15 (noted

ante vol. 38, p. 189). The Court of Appeal had taken the view that any appreciable obstruction of ancient lights constituted an actionable wrong for which a mandatory injunction to remove the obstruction might properly be granted; their Lordships (Lords Halsbury, L.C., and Lords Macnaghten, Davey, Robertson and Lindley) however have taken a more liberal view of the matter, and have come to the conclusion that it is not every interference with an ancient light which will give a right of action; in the words of Lord Hardwicke, adopted by the Lord Chancellor, "it is not enough to say that it will alter the plaintiff's lights;" in order to entitle a plaintiff to relief he must show a substantial diminution amounting to a nuisance, or which sensibly affects the plaintiff's premises and makes them less fit for occupation. In the present case the defendant's building was on the opposite side of a street 40 ft. wide, and though the plaintiff's lights were diminished, he had still sufficient for ordinary purposes.

LANDLORD AND TENANT—CONDITION TO TAKE OVER SHEEP ON EXPIRATION OF LEASE—FORFEITURE OF LEASE.

In *Breadalbane v. Stewart* (1904) A.C. 217, the appellant had entered into an agreement with a tenant that on his "away going at the expiration of the lease" he would take over the tenant's sheep at a valuation. The lease contained a proviso for forfeiture of the term for nonpayment of rent, and under this proviso the lease was forfeited; the House of Lords, on appeal from a Scotch Court, held that the agreement to take over the sheep did not apply to an "away going" by reason of forfeiture, but only applied to an away going at the contemplated expiration of the term for which the lease was granted by effluxion of time.

SALE OF GOODS—APPROPRIATION OF GOODS TO CONTRACT.

In *Reid v. Macbeth* (1904) A.C. 223, a contract had been made by the defendants with one Carmichael for the building of a ship, the contract provided that "the vessel as she is constructed all the engines, boilers and machinery and all materials from time to time intended for her or them whether in the building yard, workshop, river or elsewhere, shall *immediately as the same proceeds*, become the property of the purchasers (the defendants) and shall not be within the ownership, control or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid

purchase money." Before the ship was completed the builders became bankrupt. At the date of the bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the ship builders, intended and marked by Lloyds for the defendant's vessel. These plates were claimed by the trustee in bankruptcy of the ship builders, and also by the defendants under the above mentioned clause of this contract. The House of Lords, overruling the Scotch Court of Session, held that the defendant's contract was for a complete ship and the materials in question could not be regarded as appropriated to the contract, or sold to the defendants, and that the clause in the contract did not operate until there had been an actual incorporation of the materials in the vessel.

SHIP—CHARTER PARTY—UNSEAWORTHINESS AT STARTING—PERSONAL NEGLIGENCE OF OWNER.

City of Lincoln v. Smith (1904) A.C. 250, was an action by the charterers of a vessel for damages occasioned by the personal negligence of the shipowner. The charter party contained no provision exempting the owner from liability for damages occasioned by his personal negligence, and the loss in question was occasioned by the vessel being so laden by his orders as to be top, heavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise the vessel would have weathered in safety. The Judicial Committee of the Privy Council (Lords Macnaghten and Lindley and Sir Arthur Wilson and Sir John Bonser) under these circumstances found no difficulty in affirming the judgment of the Australian Court holding the owner liable for the loss so occasioned.

That Mr. Augustine Birrell, K.C., possesses literary enthusiasms, matters which have been said to be dangerous to the lawyer and fatal to the critic, is manifest in the following observation on Lord Acton's letters, which have been recently published: "There might well be some solemn household rite to celebrate the placing of such a book in the library." Lord Acton was a lover of "liberty based on the people's will," and his test of liberty is "the security of minorities." A lawyer may well admire such political philosophy.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

— — —
SUPREME COURT.
— — —

Que.] **PROVIDENT SAVINGS LIFE SOCIETY v. BELLEW.** [May 23.
*Life insurance—War risk—Service in South Africa—Extra premium—
Special condition—Consideration for premium.*

Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war." Each policy also provided that "the assured has hereby consent to engage in military service in South Africa in the army of Great Britain any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived in South Africa after hostilities ceased and an action was brought against the company for return of the extra premium on the ground that the insured had never been soldiers of the army of Great Britain in the time of war.

Held, DAVIES, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid was a sufficient consideration for the extra premium and it could not be recovered back.

Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

Appeal allowed with costs.

Greenshields, K.C., and *Laflamme*, K.C., for appellants. *Ryan* and *Garneau*, for respondent.

Que.] [May 25.
MONTREAL PARK, ETC., R.W. CO. v. CHATEAUGUAY, ETC., R.W. CO.

Construction of railway—Injunction—Interested party—Public corporations—Franchises in public interest—Lapse of chartered powers—"Railway" or "Tramway"—Agreement as to local territory—Invalid contract—Public policy—Work for general advantage of Canada—Limitation of powers.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the courts.

Per SEDGEWICK and KILLAM, JJ.—A company having power to con

struct a railway within the limits of a municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of article 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter.

Per GIROUARD and DAVIES, JJ.—A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter and which does not own a railway line within the limits of a municipality where such powers were granted has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with powers to construct railways and tramways, has allowed its powers as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of art. 479, of the Quebec Municipal Code. Appeal allowed with costs.

Macmaster, K.C., and *Campbell*, K.C., for appellants. *Lafleur*, K.C., and *Beaudin*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.]

FARLEY v. SANSON.

[April 18.

Landlord and tenant—Lease—Renewal—Arbitration—Appointment of arbitrators—Procedure—Interference by injunction—Jurisdiction.

A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbi-

trator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal, and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice.

Held, affirming the judgment of *BOYD, C.*, (5 O.L.R. 105,) that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal.

North London R. W. Co. v. Great Northern R. W. Co., 11 Q. B. D. 30, and *London and Blackwall R. W. Co. v. Cross*, 31 Ch. D. 354, distinguished.

Direct United States Cable Co. v. Dominion Telegraph Co., 28 Gr. 648, 8 A.R. 416, followed.

Semble, per *OSLER, J.A.*, that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf.

Marsh, K.C., for appellants. *Delamere, K.C.*, for respondents.

From Teetzel, J.]

REYNOLDS v. TRIVETT.

[April 18.

Limitation of actions—Title to land—Cancellation of deed—Cloud on title—Plan and survey—Real Property Limitation Act—Acts of ownership—Lands in state of nature—Fence built before entry—Cutting wood—Pasturing cattle—Commencement of statutory period—Knowledge of true owner.

The plaintiff claimed cancellation of a deed as a cloud upon his title so far as it affected 14 acres of land as to which the plaintiff alleged title in himself, and sought an injunction and damages in respect of trespass thereon.

Held, upon an examination of defendant's title deeds, that they did not in fact convey the 14 acres, nor even profess to do so, and therefore the plaintiff was not entitled to cancellation of the deed.

Held, also, upon the evidence, that the plaintiff had established his paper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that the 14 acres were outside of the land covered by the defendant's title deeds.

The defendant contended that he had exercised such acts of ownership upon the 14 acres more than ten years before action as had dispossessed the plaintiff, and constituted such a possession by himself as to bar the action. The 14 acres had never been built upon or cleared or cultivated or resided upon. The defendant relied upon the building of a

brush fence along the south limit of the 14 acres in 1880 or 1881 by his predecessor in title. At that time the title to the 14 acres was still in the heirs of the patentee, who had never taken possession.

Held, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner and having entered in 1888, before the statutory period had run, it became his property as absolutely as if he had built it himself.

The defendant also relied upon acts done since 1888, namely, cutting and removing wood and pasturing cattle upon the 14 acres.

Held, that these acts, being intermittent and isolated, were merely occasional acts of trespass, and insufficient to constitute possession of the kind required by the statute to bar the true owner.

Seemle, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title.

Judgment of TRETZEL, J., reversed.

John MacGregor and E. R. Reynolds, for appellant. *J. H. Moss*, for respondent.

HIGH COURT OF JUSTICE.

Street, J.]

[April 22.]

TORONTO GENERAL TRUSTS CORPORATION *v.* CENTRAL ONTARIO R.W. CO.

Pledge—Securities—Bank—Power of sale—Construction—“By giving notice”—Abortive auction sale—Subsequent private sale—Bona fide purchasers for value.

As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation, authorized the bank, upon default, “from time to time to sell the said securities, etc., by giving 15 days’ notice in one daily paper published in the City of Ottawa, etc., with power to the bank to buy in and resell without being liable for loss occasioned thereby.” Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements

at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice.

Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without a fresh notice.

Held, also, that there was nothing upon the evidence to shew that the purchasers were not bona fide purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers.

G. T. Blackstock, K.C., and *T. P. Galt*, for purchasers. *J. H. Moss*, and *C. A. Moss*, for pledgors.

Boyd, C. Meredith, J. Idington, J.]

[April 25.]

KINGSTON v. THE SALVATION ARMY.

Parties—Unincorporated association—Salvation Army—Estoppel—Interlocutory order—Amendment.

Held, affirming the judgment of FALCONBRIDGE, C.J. K.B., (6 O.L.R. 406), that the Salvation Army is not a legal entity which can be sued for wrongs done by its officers.

Held, also, that the defendants were not estopped by the interlocutory decision of a judge in Chambers, 5 O.L.R. 585.

The plaintiff was given leave to amend upon payment of costs, by adding the chief officer of the Army as a defendant.

D'Arcy Tate, for plaintiff. *A. Hoskin*, K.C., and *Lynch-Staunton*, K.C., for defendants.

Falconbridge, C.J. Street, J. Britton, J.]

[April 25.]

CRAIG v. BEARDMORE.

Sale of goods—Contract—Specific goods—Deliverable state—Property passing—Destruction—Before payment or delivery.

Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed.

The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiffs' trouble and expense of carrying the bark to the siding

and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it.

Held, that the property had nevertheless passed to the defendants, and they were liable for the price.

R. J. McLaughlin, K. C., for plaintiffs. *H. J. Scott*, K. C., for defendants.

Boyd, C., Meredith, J., Idington, J.]

[April 29.

STEACY *v.* STAYNER.

Promissory note—Accommodation indorsers—Payment of note by one—Right to recover against the other—Co-securities—Contribution—Order of indorsements—Payee indorsing after the other.

Appeal by plaintiff from judgment of TEETZEL, J., in an action to recover \$920 and notarial fees and interest paid by plaintiff to retire a promissory note made by one T. A. Stayner (now deceased), a brother of defendant, to plaintiff's order, and indorsed first by defendant and then by plaintiff. Plaintiff and defendant were accommodation indorsers. TEETZEL, J., held that the rights and liabilities of plaintiff and defendant as accommodation indorsers were governed by *Macdonald v. Whitfield*, 8 App. Cas. 733, and that plaintiff was entitled to recover from defendant, as a co-surety for the maker, only one-half the amount paid.

Upon appeal to a Divisional Court:

Held, per BOYD, C., that plaintiff did not become the holder in due course of the note sued on, but was a party to it for the purpose of lending his name to the maker, and, so far as both parties were concerned, the note was an accommodation one, within the meaning of 53 Vict., c. 33, s. 28. The relations of the parties to each other was that of sureties, and the rule of equitable contribution as between them applied. The case was not to be dealt with under the law merchant, but upon the proved and admitted circumstances under which the note was signed by both indorsers. No doubt each was misled as to the other by the makers, but that left them still inter se sureties for the one debt. Given an accommodation note, the law implies equal contribution as between the accommodation parties: *Macdonald v. Whitfield*, 8 App. Cas. 733; *Vallee v. Talbot*, Q.R. 1 S.C. 223.

Per MEREDITH, J., held that, upon the conflict of testimony, and upon the whole evidence, no more could be found as a fact than that each of the parties indorsed solely for the accommodation of the maker; that each was, or meant to be, merely a surety for him. The order of signing could

not be found, in the circumstance, to have had reference to any order of liability. The parties then being, according to the evidence, co-sureties, the ordinary rule as to contribution applied, and defendant was at most answerable for one-half of the sum in question; he had not appealed against the judgment against him to that extent.

Per IDINGTON, J., that the judgment should be affirmed, but not on the ground that *Macdonald v. Whitfield* governed the case. That case rests upon inferences of fact, shewing a common understanding amongst those held to be co-sureties. There was no such understanding here. Plaintiff was payee of the note, and signed his name as indorser under that of defendant, who had signed on the back of a blank form of note. This did not necessarily entitle plaintiff to succeed: *Robertson v. Hueback*, 15 C.P. 298; and upon the evidence plaintiff could not claim to be a subsequent indorser.

E. G. Porter, for plaintiff. *W. E. Raney*, for defendant.

PUBLIC SCHOOL LAW.

IN RE WINDSOR SCHOOLS ARBITRATION.

Public and Separate Schools—Arbitration—Organization of Separate Schools—Division of Property—Allotment of school property to Separate Schools—Proportionate allotment of school property of Protestant and Roman Catholic ratepayers at time of separation—No right of direction as to payment of money.

[Toronto, Feb. 10—STREET, J.]

The facts as found by the learned judge who was appointed arbitrator were as follows:—The Public School Board for the then incorporated village of Windsor was first organized in the year 1854. On Jan. 1, 1858, Windsor became a town, and on April 14, 1892, it became a city. From the first organization of the Public School Board until Nov. 18, 1901, all the schools in the municipality were managed by the Board of Trustees elected from time to time under the provisions of the Public Schools Acts, and were supported by rates levied under those acts without any distinction of race or creed. One school building at first, however, and later two school buildings, were set apart as schools intended specially for Roman Catholics, and the children attending these schools were taught by teachers who were Roman Catholics. An appreciable number of Roman Catholic children, however, attended the other schools, and an appreciable number of children who were not Roman Catholics attended the Roman Catholic schools.

The first school building which was set apart as a school intended specially for Roman Catholics was the Goyeau Street School, erected in 1856, upon a lot purchased by the Public School Board from Mr. John

MacEwan for £100, and conveyed by him to "the Board of School Trustees of the Village of Windsor in trust for the use and purposes of a Roman Catholic Common School in and for the said Village of Windsor." The school erected upon this lot was used for some years by the Board as one specially intended for Roman Catholics: it was then used as a high school and collegiate institute, and was finally in the year 1874 transferred by the Board to the town corporation upon their assuming payment of a debt of the Board.

In 1873 the School Board purchased for \$1,650 from Mr. Vital Ouellette a site upon which they erected a school building, called St. Alphonsus School, near the centre of the town. This site was paid for with Public School money, and was conveyed by the purchaser on Oct. 7, 1873, to "The Board of School Trustees for the Town of Windsor in trust for the uses and purposes of a Roman Catholic Common School in and for the Town of Windsor." This school seems to have taken the place of the Goyeau Street School upon the conversion of the latter into a high school. In the year 1890 a school called the St. Francis School was built upon property acquired by the Board of Trustees, and was devoted specially to the education of Roman Catholic children. Excepting in these schools the teachers employed were all Protestants. The other schools from time to time built were carried on as ordinary public schools.

During all these years, that is to say, from 1854 to 1891, there were always some Roman Catholic members of the Board of Trustees, and there was one School Inspector for all the schools. No separate accounts were kept of the sums expended upon the maintenance of the schools taught by Roman Catholic teachers and intended specially for the use of Roman Catholic children, as distinguished from those taught by Protestant teachers and intended for Protestant children: nor was there anything to prevent the parents of Roman Catholic children from sending them to Protestant schools or vice versa.

On Nov. 18, 1901, this state of things was terminated by the organization by Roman Catholics of "The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor." The legal effect of this proceeding was that the Windsor Public School Board remained, as it had always been, the owner of all the school property in the corporation, including the St. Alphonsus and St. Francis Schools, although the property of the Roman Catholic ratepayers of the city remained liable for its proportion, along with that of the other ratepayers, of a debenture debt of \$50,000, the balance still unpaid of \$120,000, which had been raised for the erection and furnishing of schools. The Separate School Board petitioned the Public School Board for redress, and then applied to the Minister of Education. As a preliminary step and for the purpose of arriving at the facts the Honourable the Chief Justice of the King's Bench was requested by the Government of the Province to hold an enquiry into the matter. In the course of this enquiry certain evidence was taken, and

a report was then made that legislation was desirable in order that the matter might be effectually dealt with. In accordance with this recommendation chap. 35 of 3 Edw. VII. was passed and received the Royal assent on June 12, 1903.

Aylesworth, K.C., for Separate School Board. *Clarke*, K.C., and *Bartlett*, for Public School Board.

STREET, J.:—Having been appointed Arbitrator under 3 Edw. VII., c. 35. s. 1, by Order in Council, I have taken some further evidence and have heard argument upon the whole matter.

The evidence shews that, at the date of the passing of the above Act the property owned by the Public School Board was as follows:—

Cameron Avenue School	cost \$19,000	built 1894-5
Park Street "	" 21,900	" 1890
St. Alphonsus "	" 21,000	" 1873
(Site cost \$1,650, school and furniture \$21,265) }	
Mercer Street School	" 20,000	" 1890
St. Francis' "	" 16,500	" 1890
Louis Avenue "	" 4,300	" 1883
Unoccupied Site	" 800	—
<hr/>		
\$103,500		

In addition to this property, they owned at the time of the organization of the Separate School Board in 1901 a school called the Central School, the building of which had cost \$14,000. The title to the property upon which it was built was, however, never acquired by the Public School Board. At the time the school was erected, an agreement existed for the purchase of the site by the Corporation of the Town of Windsor from the Dominion Government, who owned it, but this was not carried out for some years owing to the neglect of the Town Corporation to pay the price. After the Separate School Board was organized, the City Corporation, having paid the purchase money and obtained title from the Government, gave the Public School Board notice to quit. Being in the position of having erected a school upon property owned by the city, and for which they must pay if they elected to keep it, they accepted \$2,000 from the city and gave up the building. The Public School Board estimated that the building was worth no more than the value of the old material in it, which they put at \$2,000. On the other hand, three builders who had examined it gave evidence before me that it was worth \$8,000 or \$9,000. It was not suggested upon the argument that the Public School Board had not acted in good faith in selling the building to the city. They had at the time sufficient school accommodation without the Central School by reason of the departure from the public schools of a large number of the children of Roman Catholic parents, and they would perhaps not have been justified in asserting an equitable right against the city to purchase the site, which

is valued at \$18,000, when they did not need it. Under the circumstances I cannot say that they have acted unwisely or improperly, or that the value of the Central School building at the time of the separation in 1891 should be estimated at any greater sum than the \$2,000 for which they sold it. This, then, leaves the Public School Board with property at the time of the separation, which should, for the purposes of this arbitration, be taken to be as follows:—

School buildings and furniture, as detailed above	\$103,500
Central School, sold for	2,000

\$105,500

It appears from the evidence that during the period from 1854 to 1901 \$120,000 in all was raised by the municipal corporation upon debentures at the request of the Public School Board for the erection and furnishing of school houses, and if we add to the above \$103,500 the \$15,900 expended in building and furnishing the Central School, the result is that the school property at the time of the separation in 1901 almost exactly represented the amount of the monies raised from time to time upon debentures and charged against the whole of the ratepayers of the corporation. This seems to shew that the capital account has been accurately kept separate from the maintenance or income account; that the monies annually raised on the latter account have been spent, and that the capital account is represented by the sites, buildings, and furniture on hand. Of the sum of \$120,000 raised upon capital account, it appears that \$70,000 has been repaid, and that the remaining \$50,000 is a debt still due and payable by the ratepayers.

The question to be determined is whether it is just and equitable that the Separate School Trustees should be allotted a portion of the school property on hand at the passing of the Act, and if so, what portion of it?

I think it is certainly just and equitable that a portion of the property should be allotted to them, and that the allotment should be made upon the basis of \$105,500 worth of property; for they ought to have a share of the \$2,000 representing the Central School, which was owned by the Public School Board at the time of the Separation.

The next question is, how is the portion which is to be allotted to the Separate School Board to be arrived at?

It seems extremely probable from the data furnished me that the sums spent during the 48 years in question upon the maintenance of the schools set apart as Roman Catholic schools in Windsor have considerably exceeded the rates paid during those years by Roman Catholic ratepayers. It is not possible to obtain exact figures shewing this, because no separate account of the expenditure upon the several schools has been kept, and the expert accountant who endeavoured to separate the accounts last year expressly states that his figures are largely conjectural. Other figures, however, shew that, while the Roman Catholics have paid less than one-fourth

It has fortunately been found feasible to separate the sum levied for education during the 48 years in question upon the property of Roman Catholic ratepayers from those levied upon the property of persons who are not Roman Catholics (to whom I shall refer hereafter as "Protestants"), and the result is as follows:—

Then there arises the question as to how the rates levied upon the corporation should be treated. Until the statute 49 Vict., c. 46, s. 53, passed in the year 1886 by the Ontario Legislature, no provisions existed by which any of the school rates paid by incorporated companies could be appropriated to Separate schools. By that Act, however, it was provided that a company might, by notice to the clerk of any municipality in which a Separate school existed, require any part of its real property to be assessed and rated for the purpose of a Separate School, but subject to the proviso that the share or portion of the property of the company rated or assessed in any municipality for Separate School purposes should bear the same proportion to the whole property of the company assessable within its municipality as the amount paid on shares in the company by Roman Catholics bore to the whole amount paid on the shares of the company.

If there had been a Separate School Board organized in Windsor prior to 1886, it could not have claimed any share in the rates paid by Companies until the passing of the Act of that year; and after the passing of that Act it could claim only such share as the Company choose to direct, such share being strictly limited by the interest held in the stock of the Company by Roman Catholics as compared with that held by other persons. The onus of shewing some facts to entitle themselves to claim to have the school rates paid by Companies in Windsor taken into account in the present adjustment, lies upon the Separate School Board: but there is no evidence that any of the companies by whom the rates in question have been paid, including four railway companies, three chartered banks, a telegraph company, the Bell Telephone Co., several loan companies and numerous local companies, have ever paid a farthing towards Separate School rates in any of the numerous municipalities in which they must be assessed, nor has any attempt been made to shew the proportion of Roman Catholic shareholders in any of them. I am therefore entirely without evidence to shew me that it was ever possible for the directors of these companies to have required any part of the taxes paid by them to be devoted to Separate School purposes, and I am compelled to treat all the rates paid by them as rates which should not be taken into account as having been paid by possible Separate School supporters, and they must be added to the rates paid by Protestants. This leaves the figures as follows:—

Rates paid in 48 years by Protestants	\$270,003
“ “ “ Corporations.....	72,132

Total applicable as rates paid by Protestants \$342,135

Rates paid in 48 years by Roman Catholics..... 112,174

Total rates paid in 48 years \$454,309

The proportion of the total rates paid during this period by Protestants is 75.3 to 24.7 paid by Roman Catholics.

That the school property on hand should be divided between the Public School Board and the Separate School Board in proportion to the contributions to school rates of Roman Catholic and Protestant ratepayers in the past would undoubtedly in my opinion be the proper solution of the controversy if I could assume, or if it could be proved, that all Roman Catholic ratepayers are Separate School supporters, or that those who are not are equalled by the number of Protestants who are. There are, however, figures before me in evidence and not disputed which seem to prove the reverse. The first assessment for Roman Catholic Separate Schools was made in 1901, for the taxes to be levied in 1902: and that assessment shews the following figures:—

For Public School purposes	\$4,572,436
For Separate School purposes	872,889

Total Assessment \$5,445,325

In that year the assessment of Separate School supporters therefore amounted to only 16.03 per cent. of the whole, as against 83.97 per cent. of Public School supporters.

The next assessment was made in 1902 for the taxes to be levied in 1903, and shews the following figures:—

For Public School supporters.....	\$4,618,621
For Separate School supporters.....	1,066,529

Total assessment.....	\$5,685,150
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In that year the assessment of Separate Schools supporters therefore amounted to 18.76 per cent. of the whole, as against 81.24 per cent. of Public School supporters.

For the two years the assessments are as follows:—

17.424 for Separate School purposes;	
82.576 for Public	" "

Turning to rates arising from the respective assessments of Roman Catholic and Protestant ratepayers down to the time of the separation, I find the average as I have mentioned to be as follows:—

Proportion levied upon Roman Catholic ratepayers	24.7 per cent.
And " " Protestant	85.3 "

This proportion had been, roughly speaking, fairly constant for a number of years. I find therefore that while the assessment of Roman Catholic ratepayers represented upwards of 24 per cent. of the whole assessment, the assessment of Separate School supporters represented only 18¾ per cent. of the whole, even for 1903, which was the more favourable of the two assessments since the separation. This discrepancy shews plainly that about 5¾ per cent. of the Roman Catholic ratepayers had not become Separate School supporters at the date of the last of these two assessments.

It is necessary to take into consideration the rights of those Roman Catholics who are not Separate School supporters, and in making the division not to give to the Separate School Board the benefit of their assessments when they are Public School supporters. I do not think I should be justified in assuming that the number of Roman Catholic supporters of public schools will in future be so large. The two years in question are those when the Separate Schools had just been organized and when their attractions were probably comparatively few. Until they were in full working order, Roman Catholic parents having children in advanced classes in the Public Schools would be unwilling to become Separate School supporters and to remove their children to the newly-organized Separate schools. The third year of the Separate School organization should, therefore, shew, I think, an increase over the second year in the number of Roman Catholic supporters of Separate schools, as the second did over the first. Bearing these considerations in mind, I should not assume on the one hand that all Roman Catholic ratepayers will ultimately become

Separate School supporters, nor on the other that the proportion of Roman Catholic ratepayers who are not Separate School supporters will always remain so large as it was in 1901 and 1902. I think, in order to do justice, that the line should be drawn about midway. This would give to the Separate School Board 21 per cent. of the property to be divided, leaving the other 79 per cent. to the Public School Board. The amount to be divided should be put, as I have said, at \$105,500, and of this the Separate School Board should have 21 per cent., that is to say, property of the value of \$22,155.

The question next arises as to the property which should be allotted to the Separate School Board in respect of this sum, and I have heard argument upon this question since I arrived at the figures. The schools of St. Francis and St. Alphonsus are those, as I have said, which before the separation were set apart especially as Roman Catholic schools, the latter being expressly conveyed to the Board of Education in trust for that purpose; and it was for those two schools that the Separate School Trustees asked when they petitioned the Public School Board in December, 1901. Since then, however, they have acquired and are now using as a Roman Catholic Separate School another site and building in the extreme east of the city, and within about 500 feet of the St. Francis' School, so that it would not be proper to allot that school to them, and they object to taking it. They ask for the Park Street School, which is a school built in 1890, in preference to the St. Alphonsus' School, which was built in 1873, and enlarged in 1889. Both of these schools are upon Park Street within 1,000 feet of one another, and comparatively near the centre of the town.

Taking into consideration the fact that the St. Alphonsus' School was selected and built especially for the purpose of accommodating the children of Roman Catholic parents; that it was used by them for a period of 28 years, and that they asked to have it turned over to them at the time of the separation, and there appearing no reason founded upon the question of convenience why they should have the Park Street School in preference to it, I think they should have the St. Alphonsus' School. That school, however, stands in a different position from the others so far as the value placed upon it is concerned. The site was purchased for \$1,650 in 1873, and the school was built in that year, costing, with the alterations made in 1889, \$20,265. In the valuation of sites and buildings, upon which I have been acting, all the other school sites, buildings and furniture are placed at actual cost; but in the case of St. Alphonsus' School, the site, which cost \$1,650 in 1873, is now valued at \$4,000, and the building, which cost \$20,265, is now valued at \$16,000; in other words, while \$4,265 is written off the cost of the building by reason of 30 years' wear and tear, \$2,350 is added to the value of the site by reason of the improvement in the value of land in its neighbourhood.

The property, however, is to be allotted to them for school purposes, and is intended to be used for those purposes: what they need is rather a

good school building than a valuable site: they would prefer the Park Street School with an \$18,000 building and a \$2,500 site to the St. Alphonsus' School with a \$16,000 building and a \$4,000 site even if they were charged with the \$500 extra cost of the former. Under these circumstances I do not think I could fairly charge them with the whole of the increased value of the site. The Park Street site cost \$2,500 and I think if I charge the St. Alphonsus site at \$2,650, which is \$1,000 over its cost, I shall be as nearly right as it is possible to get in such a matter.

This would make the St. Alphonsus' School worth to the Separate School Board \$19,650, made up as follows:—

Site	\$2,650
Value of building	16,000
Furniture, etc.	1,000
Total	\$19,650

This would leave \$2,505, or say \$2,500, still to be allotted to make up the \$22,155. I have no power to direct the Board of Education to pay any sum of money to the Separate School Board. I can only under the Act allot real estate or other property owned by the Board of Education.

I take therefore the Louis Avenue School, the site and building of which are valued at \$4,000, and I allot to the Separate School Board 25/40ths of it. I should have preferred to have directed one party or the other to pay a sum of money, but the Act gives me no such power. Each School Board has power under the general law to purchase or sell its interest to the other.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.]

REX v. BREEN.

[May 13.

Liquor License Act—Defective information—Prohibition.

An information was laid at Halifax on April 25th, 1904, by the Chief Inspector of Licenses for the Municipality of Halifax County, who resides 35 miles from the City of Halifax, before the Stipendiary Magistrate for the County of Halifax, against the defendant, charging him "for that he within the space of six months last past previous to this information" at . . . unlawfully, etc., (a) did sell, etc., and (b) did keep for sale, etc., intoxicating liquor contrary to the provisions of The Liquor License Act. The only evidence offered by the prosecution was that of the Chief Constable for the County of Halifax, who swore that in company with the

inspector on April 23rd, 1904, he visited the defendant's house within the County of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served accused with papers under the Act. The defendant gave no evidence nor called any witnesses but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant, who in the meantime applied ex parte for prohibition under Crown Rule 72.

Held, following *Rex v. Boutilier* (p. 439 ante) that as it did not appear by the information that it was laid within six months after the commission of the offence or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction and should be prohibited from further proceeding in the matter. *Reg. v. Bennett* I. O. R. 445, referred to.

John J. Power, for the motion.

Province of New Brunswick.

SUPREME COURT.

En banc.] *LAWTON CO. v. MARITIME COMBINATION RACK CO.* [June 17.
Contract for manufacture—Time—Work up to sample but not to specification—Conflicting findings of jury.

On Feb. 12, 1902, plaintiff company wrote defendant company, offering to build 200 racks according to specifications that had been sent them "in a specified time" at \$8.50 each, and asking in the event of their tender being accepted that a sample rack be shipped them. On Feb. 18 defendant company accepted this tender, "the racks to be made according to specifications and subject to the approval of their inspector." In a letter acknowledging the order defendant company agreed to deliver 100 racks on or about April 20 and the balance on May 20. Defendant company were to furnish certain maleables, and in the last letter the defendant company were notified that these maleables must be delivered not later than April 1. Defendant company wrote that they could not bind themselves to deliver the maleables by that date, but would do so as fast as they could get them from the manufacturers. They sent the sample rack on March 19. On April 7 the maleables not having been furnished, the plaintiff company wrote that this would void the time specified for completion of the racks, but

they would endeavour upon their arrival to finish the racks promptly. On April 26 defendant company shipped one lot of maleables, and on May 1 another, and in a letter notifying the shipment on April 30 stated that this would enable them to finish up 50 of the racks. The plaintiff company was urged several times by letter during May to push on the work and finally on June 24th they were notified that July 15 would be the very latest date on which delivery would be accepted. On July 4 plaintiff company had 48 racks completed and all the materials ready to put the remaining 152 together. Defendant company sent a man to inspect the work. He condemned the completed racks as not in accordance with the specifications and also those which were in process of construction. In an action to recover damages for breach of contract the jury found in answer to questions submitted by the judge that the 48 racks were not in accordance with the contract and specifications, but that they were in accordance with the sample rack furnished by the defendant company; that the plaintiff company after receiving the maleables proceeded to construct the 200 racks within a reasonable time, and that the defendant company agreed that the plaintiff company should have until July 15 for the completion of a portion of the racks. They also found in answer to questions submitted by the defendant's counsel that the defendant company employed a proper and competent inspector and that he acted in good faith in condemning the racks, but that the defendant company wrongfully discharged the plaintiff company from the contract. They assessed the damage at \$831.70.

Held, on motion for a new trial, that the plaintiff's verdict could not stand in view of the jury's findings that the inspector acted in good faith and that the plaintiff company did not manufacture the racks in accordance with the contract and specifications.

Bustin and Knowles, for plaintiff. *Gregory, K.C.*, for defendant.

En banc.]

PICKARD v. KEARNEY.

[June 17.

Trespass—Disputed line—Different surveys—Jury's finding conclusive.

In an action of trespass to land the question turned upon the correctness of different surveys. For the plaintiff two surveys were proved—one by G. in 1878 and one by D. some years later. These two surveys located the disputed line at two different points two or three rods apart, but in either case defendant would be a trespasser. In behalf of the defendant a survey made by H. a few years ago was proved, which placed the locus in quo within the lines of defendant's lot. The jury found for plaintiff.

Held, although the trial judge stated that he would have said H.'s survey was right had the question been for him the verdict should not be disturbed, the jury having found otherwise. New trial refused.

Carvell, for plaintiff. *Hartley*, for defendant.

En banc.]

HALE v. TOBIQUE MANUFACTURING CO.

[June 17.

Lumber contract—Contradictory provisions—Discrepancy in scale—Account settled.

This action was brought to recover a balance alleged to be due for logs delivered to defendant on three contracts, under which plaintiff delivered lumber at St. John to the amount of \$50,138.86. On account of this he received cash and supplies to the amount of \$46,865.39. One clause in the beginning of the contracts stated that the lumber was to be delivered "free from all charges." A later clause provided that "the company were to pay or arrange for the stumpage on the said logs and lumber." The contract also provided that the lumber was to be scaled by a scaler to be appointed by the company. F. H. H., president of the company, notified the plaintiff that H. & Co. of St. John had been appointed scalers under this provision, and they accordingly did scale the lumber at St. John. In March, 1903, plaintiff received an account from defendant company showing cash and supplies furnished him on account of the contracts. This he handed to P., his clerk. In June he and P. went with the books and the defendant's account to defendant's office to settle, and went over the accounts with the managing director of defendant company. Previous to this defendant had received a bill of the scale made at Fredericton by the Fredericton Boom Co, which was \$964.73 less than the scale made by H. & Co. at St. John. Defendant company in their account adopted the Fredericton scale and they also charged plaintiff with \$915.00 stumpage. Plaintiff made no objection to the stumpage in the adjustment of accounts, stating upon the trial that he had not noticed the provision referred to in the contract, but plaintiff did object to the Fredericton scale and claimed he should be allowed upon the basis of the St. John scale. Several items were objected to by defendant company, and an account was made up showing a balance due plaintiff of \$1,390.82. P. in his evidence stated that he did certain figuring and arrived at \$1,390.82 as the amount due plaintiff upon the basis of the Fredericton scale and charging plaintiff with the stumpage, but both he and the plaintiff denied that they had agreed to this amount. The judge directed the jury that under the contracts the plaintiff was not liable for the stumpage and the jury found that the defendant company accepted the lumber as surveyed in St. John; the plaintiff did not agree to the balance of \$1,390.82 and found a verdict for the defendant for the \$964.73 and the \$915.02, in addition to the \$1,390.82—in all \$3,270.57

Held, on motion for a new trial, that the defendant was bound by the St. John scale, that the plaintiff was not liable for the stumpage, and that the verdict was right.

Carvell, for plaintiff. *Connell*, K.C., for defendant.

En banc.]

PORTER v. BROWN.

[June 17.

Ejectment—Title by possession—Payment of taxes and insurance—Perverse verdict.

Defendant in an action of ejectment had a deed of the land in question, dated Jan. 8, 1903, from W.P.E., the son and sole heir of M.E., to whom plaintiff leased the land in 1871 for ten years at \$40 a year and who died after the expiration of the lease, in 1881, having paid the rent for only the first five or six years. M.E. was a sister of plaintiff. After leasing the land in 1871 she built a house upon it. Shortly after her death W.P.E., an epileptic subject, much addicted to drink and mentally weak, arranged with W.B. and his wife (the defendants) to live with and take care of him upon the place. They accordingly went with him and lived there until the death of W.B. in Jan., 1902, after which defendant continued in possession with W.P.E. until and after the commencement of the action. Defendant swore that under the arrangement with W.P.E. he was to give her the property. Plaintiff swore that after M.E.'s death he gave notice to W.P.E. that he was occupying as a tenant at will under him, and at a rental of \$100, with the privilege of having the B's as sub-tenants to take care of him and that W.P.E. agreed to this and also that the B's would pay half the taxes and W.P.E. the other half. Plaintiff also swore that the arrangement between the B's and W.P.E. was that they should board and take care of him in lieu of the rent, and that he (plaintiff) consented to this. W.P.E. had some money which plaintiff took charge of and out of which he remitted him from time to time, he testified, small amounts as he would require. Plaintiff swore that he paid the taxes with his own money during the last ten years. Defendant swore that she and her husband paid half the taxes every year for twenty-two years and that plaintiff paid the other half with money which belonged to W.P.E. No rent has been paid since the death of M.E. Plaintiff kept the building insured. In 1895 the house was damaged by fire. He collected the insurance and made the repairs. The B's moving out and returning when they were completed.

The trial judge, summing up the facts, told the jury that it would be difficult for them to come to the conclusion that either W.P.E. or the B's were holding in actual, open, adverse possession." The jury, however, found that both W.P.E. and the defendant herself had open, exclusive, adverse possession for twenty years prior to the bringing of the action, and a verdict was entered for the defendant.

Held, on motion for a new trial, that the verdict was not perverse but that there was no evidence to warrant the findings.

New trial.

McMonagle, K.C., for plaintiff. *Grimmer*, K.C., for defendant.

En banc.]

GRANT v. C. P. R. Co.

[June 17.]

Damage by fire—Negligence—48 Vict., c. 11—Constitutionality—Applicability to fire on railway line.

This action was brought to recover damages for the destruction of plaintiff's lumber and woodland adjoining defendant company's line of railway by fire alleged to have been negligently started by defendant's servants and allowed to extend to plaintiff's land. N., an employee of the defendant railway, set fires in May 20 and 22, 1903, to burn up some piles of rubbish on the railway line. There had been no rain for some time and forest fires were burning all over the country. Two or three witnesses in behalf of plaintiff swore that they saw the fire on the railway line and traced its course through the fence and to plaintiff's land. N. swore that the fires which he started were all burned out before the fire was seen on plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N. and that N. negligently and unreasonably allowed it to extend, and a verdict was entered for the plaintiff for \$500.

Held, on motion for a new trial, that the evidence was sufficient to warrant a verdict.

Held, per McLEOD, J., following *Rylands v. Fletcher*, L.R. 3 E. & I. App. 330; *Nichols v. Marsland*, L.R. 1 Ex. Div., and *Jones v. Festiniog Railway Company*, L.R. 3 Q.B. 733, and *Phelps v. Southern R.W. Co.*, 14 S.C.R. 432, that the defendant was liable, though no acts of negligence were shewn, they having brought at their own peril a dangerous element upon their land not naturally there.

Held, also, per McLEOD, J., that ss. 3, 4, 5 and 9 of 48 Vict., c. 17, entitled "An Act to prevent the destruction of Woods, Forests and other property by fire," is intra vires of the Local Legislature.

Held, also, per McLEOD, J., that the provision requiring notice to be given to the owner of adjoining land of an intention of starting a fire, and providing that failure to give such notice shall be conclusive evidence of negligence applies only to a case where a person desires to clear land and not to a case like the present, but that this case falls within the provisions of the Act declaring that a person starting a fire, except for certain purposes specified in the Act between May 1 and Dec. 1, is guilty of negligence, and that the defendant is therefore liable under the Act as well as at common law.

Carvell, for plaintiff. *Connell*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Dubuc, C.J.]

CZUACK v. PARKER.

[June 1.

Specific performance—Sale of land—Purchaser for value without notice—Contract—Cancellation—Service of notice of cancellation—Costs—Further relief—Amendment.

Action for specific performance of an agreement for sale of land by defendant Hough to the plaintiff dated 24th November, 1902, for the sum of \$640, of which \$200 was to be paid in cash and the balance in five annual instalments, with interest at six per cent per annum, payable half-yearly. The plaintiff paid the \$200, went into possession of the land, built a house and stable on it and did some ploughing. He did not register his agreement, the land having been bought under "The Real Property Act." In July, 1903, the defendant Robinson, wishing to acquire title to the property in question so as to add it to adjoining land owned by him, through his solicitor obtained from Hough an assignment of the agreement and also a transfer of his title to the land on payment of the amount due by plaintiff under the agreement. Before signing such documents Hough informed the solicitor that he had sold the land and stipulated verbally with him that the plaintiff was to be protected in his purchase. The assignment and transfer were prepared by Robinson's solicitor, and contained no reference to the sale that had been made to plaintiff. The trial judge found as a fact that Robinson had been guilty of fraud in procuring said transfer with the intention of depriving the plaintiff of the benefit of his purchase. Plaintiff having neglected to pay the interest due in May, 1903, Robinson undertook in the following August to cancel the agreement of sale held by the plaintiff, and swore at the trial that he had sent a notice of the cancellation by mail to the plaintiff, as provided for in the agreement. There were two clauses in the agreement providing for cancellation in case of default by the purchaser in making payment; the first saying that, after such default, the vendor might cancel with or without notice; the second, that "in case of default, and the vendor shall see fit to declare this contract null and void by reason thereof, such declaration may be made by notice from the vendor addressed to the purchaser directed to the post office at Gonor, Manitoba.

Held, that the vendor might elect to adopt one or other of such modes, that if he elected to cancel without giving notice he could not do so by a mere operation of his mind, but must do something by which he clearly gives the purchaser to understand that he decides to avoid the contract and that the relation of vendor and purchaser no longer exists between them, or he must do some act directly affecting the vendee in his position or interest, as, for example, a sale to another: *McCord v. Harper*, 26 U.C.C.P. 104; and on the other hand, if he adopts the mode of cancel-

lation by notice he is bound to do so in the manner provided and must conform strictly to the mode prescribed.

The proof of the mailing of the notice was conflicting and far from satisfactory. The plaintiff swore positively that he had never received any such notice, and there was no evidence to show that he had. The proof of the contents of the notice was by an impressed tissue paper copy and the name of the addressee was thereon written as Paul *Cynack*, whilst the plaintiff's name, as clearly written in the agreement, was *Czuack*, so that, assuming that the name on the envelope was spelled in the same way, the post master might easily have handed the letter to some other person.

Held, that notice of cancellation was not sufficiently proved, and that the agreement had not been effectively cancelled by the proceedings taken. Assuming that the plaintiff really understood the full meaning of the two clauses, he had a right to expect that the second mode would be adopted in case he made default and had reason to feel perfectly safe until he would receive a notice to pay or otherwise that the agreement would be cancelled.

Robinson, however, afterwards conveyed the property to the defendant Parker, who denied all knowledge of the plaintiff's position and rights with respect to it, and claimed to be a purchaser in good faith without notice. His conduct was, in the opinion of the judge, open to unfavourable inference or surmise, but there was no proof that he had actual notice of the plaintiff's rights or of his possession of the land or that he had any knowledge of the fraudulent schemes of Robinson. Fraud is not to be presumed on mere suspicion, but must be positively proved.

Held, that the plaintiff could not have specific performance against Parker, as the land was under the Real Property Act, and Parker was not bound to inquire as to the rights of any person in actual possession: Real Property Act, R.S.M. 1902, ss. 70, 74, 76.

The plaintiff was allowed to remove the house which he had erected on the land; but, if he elected to do so, he was required to pay Parker \$100 as damages for cutting wood on it, for which Parker had counter-claimed. If plaintiff did not take away the house Parker to accept it in full of the damages.

Action dismissed as against Hough and Parker. Defendant Robinson ordered to pay plaintiff's costs, also those of his co-defendants, as he was found guilty of fraud.

In his statement of claim the plaintiff had asked only for specific performance of the agreement, but under the power conferred on the Court by section 38 (K) of the King's Bench Act and Rules 344 and 346 as to amendment of the pleadings if found necessary. The judge granted the plaintiff further relief against Robinson by ordering the latter to pay the plaintiff, by way of damages, what he had paid to Hough on account of the purchase money of the property with interest.

Haggart, K.C., and *Whitla*, for the plaintiff. *Aikins*, K.C., for Parker. *Robson*, for Robinson. *A. C. Ferguson*, for Hough.

Province of British Columbia

SUPREME COURT.

Duff, J.] IN RE VANCOUVER ENGINEERING WORKS. [May 17.

Alien Labour Act—Infraction—Advertising for workmen.

Case stated for the opinion of the court by way of appeal from the Police Magistrate of Vancouver. The information charged the company with an infraction of the Alien Labour Acts.

60 & 61 Vict. (D) c. 11, s. 1, reads as follows.

"From and after the passing of this Act, it shall be unlawful for any person, company, partnership, or corporation in any manner to prepay the transportation or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labor or service of any kind in Canada."

1 Edw. VII (D) c. 13, s. 4, an amending section, enacts, that "it shall be deemed a violation of this Act for any person, partnership, or corporation to assist or encourage the importation or immigration of any person who resides in or is a citizen of any foreign country to which this Act applies by promise of employment through advertisement printed or published in such foreign country, and any such person coming to this country in consequence of such advertisement shall be treated as coming under contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable to such."

The accused caused to be inserted in a newspaper published in Seattle, U. S., the following advertisement;—"Wanted, first-class machinists. Apply Vancouver Engineering Works, Ltd., Vancouver, B.C."

The Police Magistrate dismissed the information. The question submitted for the opinion of the Court was—"Does the above advertisement contain a promise of employment within 1 Edw. VII. c. 13.

Held, that the advertisement did not contain a promise of employment, but was merely an invitation to apply for employment, and it did not help the prosecution that the legislation thus construed imposes no effective restraint upon the importation of foreign labor and that the result is alien to the spirit and design of the enactment.

J.E. Bird, for the prosecution. *C.B. Macneill*, for the defendants.

Book Reviews.

A Treatise of the Law of Eminent Domain in the United States, by JOHN LEWIS. Second edition. Vol. 1. Chicago, U.S., Callaghan & Co.; 1,555 pages. \$12.00.

Although this second edition has already been before the public for some little time the subject is so important that a reference to it even at this late date is desirable. The first edition was published in 1888 and in that volume some 6,000 cases were referred to. In the present edition they count up to nearly 13,000. It is interesting to note the tremendous increase in litigation falling under the title of Eminent Domain, and that there are more decisions on the subject in the United States since the first edition than in all the previous history of that Country. The first edition did not refer to English or Canadian authorities. The present edition cites 245 from England and 108 from Canada. New York leads off with the enormous number of 1,728. Whilst a large number of the cases discussed are of interest only to American readers by reason of their being based on statutes which have no force in this country, there is nevertheless such a similarity in the circumstances of the Dominion and the United States that much light is shed upon many of our constitutional questions, such for example as—"What constitutes a taking?"—"Public use"—"Just compensation," etc. The marvellous multiplication of the means of transportation and communication, added to the many new public utilities which involve the taking and damaging of property, have brought in many new and strange questions, and renders the subject of this book one of great importance to all professional men.

As Mr. Lewis' book has been for many years a standard work it is scarcely necessary to criticise it. It may be said, however, that a reference to such a multitude of cases necessarily makes the work largely a digest of authority, but arranged in such a convenient and accessible manner as to give the reader a comprehensive view of the various matters discussed.

COURTS AND PRACTICE.

Horace Harvey of the City of Regina, N.W.T., Barrister-at-law, to be Puisne Judge of the Supreme Court of the Northwest Territories. Gazetted July 16th, 1904.

The Living Age: Boston, U.S.—This excellent publication, containing a collection of articles of interest appearing in the various reviews of the day, still continues to give much more than its comparatively small cost. The articles at present appearing are very timely and especially give a comprehensive view of the conditions of things in the far East. Added to these are discussions on a variety of topics of a literary and historical character. Fiction is not forgotten, and a novel called "Lychgate Hall" is just being commenced, which promises well.

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LIABILITY OF AN EMPLOYER FOR THE TORTS OF AN INDEPENDENT CONTRACTOR.

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I. INTRODUCTORY.

1. **General doctrine stated.**—In this monograph it is proposed to discuss the effect, and define the limits, of a doctrine which may, according to the standpoint from which it is considered, be stated generally in one or other of these three forms :

(1) Where the injury complained of resulted from the tortious conduct of an independent contractor, the rule which is embodied in the maxim, *Qui facit per alium facit per se*, is not applicable (a). Similar statements are also made with regard to the inapplicability, under such circumstances, of the maxim, *Respondeat superior* (b).

(a) *Quarman v. Burnett* (1840) 6 Mees & W. 509, 9 L.J. Exch. N.S. 308, 4 Jur. 969, per Parke, B.; *Wiswall v. Brinson* (1849) 32 N.C. (10 Ired. L.) 554.

(b) "The only principle upon which one man can be liable for the wrongful acts of another is, that such a relation exists between them, that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is: *Respondeat superior*. It is only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint." *Blackwall v. Wiswall* (1855) 24 Barb. 355. Similar phraseology is found in *Bibb v. Norfolk & W.R. Co.* (1891) 87 Va. 711, 14 S.E. 163; *Cincinnati v. Stone* (1855) 5 Ohio St. 38; *Du Pratt v. Lick* (1869) 38 Cal. 691; *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352; *Deford v. State* (1868) 30 Md. 179.

"The general principle to be extracted from them [i.e., the authorities] is that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant or principal and agent exist between them; that, when an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured." *Painter v. Pittsburgh* (1863) 46 Pa. 213.

"It seems to be settled law that, where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular

(2) A person who employs an independent contractor to perform a specific piece of work is not liable for injuries caused by any merely collateral or casual torts which he may commit while the work is in progress (c).

(3) An employer is not liable for an injury resulting from the performance of work deputed by him to an independent contractor, unless that work was positively unlawful in itself, or the injury was the necessary consequence of executing the work in the manner provided for in the contract, or subsequently prescribed by the employer, or was caused by the violation of some absolute, non-delegable duty which the employer was bound, at his peril, to discharge, or was due to some specific act of negligence on the part of the employer himself (d). It will be observed that the

standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co. v. White* (1890) 124 Ind. 376, 24 N.E. 747.

(c) "No one can be made liable for an act or breach of duty, unless it be traceable to himself or his servants or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong of negligence, the employer is not answerable." *Pickard v. Smith* (1861) 10 C.B.N.S. 470, 4 L.T.N.S. 470.

For other statements of a similar tenor see § 39, post.

(d) The various qualifying elements here mentioned are not all referred to in any single judicial enunciation of the doctrine; but, as each of them embodies the effect of certain distinct groups of cases which will be reviewed in subsequent sections, they are here collected in the same statement, for the purpose of showing the full extent of the limitations to which the doctrine is subject. The following paragraphs will serve as sufficient illustrations of the language used by courts and text-writers.

In a leading case Cockburn, Ch. J., refers to the general rule, "that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor, and not the employer, is liable." *Bower v. Peate* (1876) L.R. 1 Q.B. Div. 321.

"It is now settled in that country [i.e., England] that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal." *Painter v. Pittsburgh* (1863) 46 Pa. 213; *Edmundson v. Pittsburgh, M. & Y.R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The doctrine as to the non-liability of an employer for the acts of an independent contractor "has regard to cases where the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed, can lawfully commit its performance to others." *Allen v. Willard* (1868) 57 Pa. 374.

"Where work which does not necessarily create a nuisance, but is in itself harmless and lawful, when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish the end prescribed, by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answer-

torts which are covered by the descriptive epithets "collateral" and "casual," as used in the second form of statement, are identical with those which fall outside the scope of the exceptive clauses in the third.

The doctrine thus enunciated is a protection to a principal contractor in any case where the sole cause of the injury complained of was the negligent or otherwise wrongful act of a sub-

able." *Wabash, St. L. & P.R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

"When a contractor takes entire control of a work, the employer having no right of supervision or interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it." *Lancaster Ave. Improv. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

"If damage result from the manner in which a contractor chooses to execute a perfectly valid contract without the proprietor's interference or direction, the latter is not responsible." *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

"It is well settled that, where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury." *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S.W. 435.

"The great weight of the modern decisions upon this question establishes the rule that where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting not from the fact that the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages." *Robinson v. Webb* (1875) 11 Bush 464.

"If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work." *Bailey v. Troy & B.R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The employer is not liable either for the fault or for the negligence of the independent contractor unless he expressly directed the wrongful or improper act." Lord Gifford in *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535.

Where parties enter into a contract which is in itself lawful, and the contractor, in carrying on his work does anything injurious to another, he alone is responsible. *Woodhill v. Great Western R. Co.* (1855) 4 U.C.C.P. 449.

"The general rule is, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his sub-contractors, or his servants, committed in the prosecution of such work." 1 Thomp. Neg. 1st ed. s. 22, p. 899; 2nd ed. s. 621, cited with approval in several cases; e.g., *Fink v. Missouri Furnace Co.* (1884) 82, Mo. 276, 283, 52 Am. Rep. 376.

Under the plea of the general issue alone, there is no error in charging to the effect that, "where one has a lawful work to do, and employs another, who has an independent business of his own including work of that class, to do it, and where the employer does not himself exercise any direction as to how it shall be done, he is not responsible for any wrongs that the employee may commit in the course of the work." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S.E. 320.

contractor (*e*). A fortiori the employer of the principal contractor is not liable for the torts of a sub-contractor (*f*).

In one of the American States the common law doctrine has been formally adopted in legislative enactments (*g*). In another the construction placed upon a provision of a less explicit character has been determined by the assumed existence of that doctrine (*h*).

2. History of the doctrine.—(*a*) *Bush v. Steinman* considered.—

The doctrine now under discussion is one of comparatively recent growth. An examination of the language used by the judges, the authorities cited, and the arguments relied upon by the defendant's counsel, in the earliest of the reported cases on the subject, which was decided towards the close of the eighteenth century, will make it apparent that at that date the responsibility of an employer for the torts of a contractor was deemed to be the same in kind and degree as his responsibility for the torts of a servant or an agent (*a*). The influence of this decision is distinctly

(*e*) *Rapson v. Cubitt* (1842) 9 Mees & W. 710, Car. & M. 64, 11 L.J. Exch. N.S. 271, 6 Jur. 606; *Overton v. Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65; *Pearson v. Cox* (1877) L.R. 2 C.P. Div. 369; *Wray v. Evans* (1876) 80 Pa. 102; *Slater v. Mersebau* (1876) 64 N.Y. 138; *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 13 S.W. 391; 17 Am. St. Rep. 925; *Schulte v. United Electric Co.* (N.J. 1902) 53 Atl. 204.

(*f*) *McLean v. Russell* (1850) 12 Sc. Sess. Cas. 2nd Series, 887; *Cuff v. Newark & N.Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *Aldritt v. Gillette-Hersog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741; *St. Louis A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S.W. 9; *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

(*g*) "The employer generally is not responsible for torts committed by his employee when the latter exercises an independent business, and it is not subject to the immediate direction and control of the employer." Georgia Code, 1895, s. 3818.

(*h*) Article 2320 of the Revised Code of the Louisiana runs as follows: "Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed; . . . responsibility only attaches when the masters or employers, or teachers, and artisans, might have prevented the act which caused the damage, and have not done it." This provision was held not to be applicable to a case in which the injury resulted from the manner in which an independent contractor employed by the defendant had performed work over which the defendant himself had no supervisory control. *Gallagher v. South-Western Exp. Ass.* (1876) 28 La. Ann. 943.

(*a*) *Bush v. Steinman* (1799) 1 Bos. & P. 404. The facts upon which recovery was allowed were these: A. having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, the result being that the plaintiff's carriage was overturned. The contention of defendant's counsel was that the liability of the principal to answer for his agents is founded on the superintendence which he is supposed to have over them, (1 Bl. Com. 431), and that it was not in

the power of the defendant to control the agent by whose act the injury was caused. Eyre, Ch.J., after stating that all the judges were of opinion that the action could be maintained remarked: "I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." But he considered that the defendant might be charged with liability on the authority of three cases, *Stone v. Cartwright*, 6 T.R. 411, 3 Revised Rep. 220, and *Lonsdale v. Littledale* (1793) 2 H. Bl. 267, 269, and one which had not been reported, but which Buller, J., recollected.

With regard to the first of these cases, it is to be observed that the injury was caused by the acts of the defendant's servants, a circumstance which, if the law had been then definitely settled in its present form would clearly have rendered it inapplicable as a precedent. In the second case the negligent persons were the immediate servants of the defendant, as they were hired by his steward or foreman. Its effect and rationale were stated by the learned Chief Justice as follows: "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *Sic utere tuo ut alienum non laedas*. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. . . . The principle of this case therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point." Such language would, it is clear, not be used by any modern Judge.

The ruling in the third case dealt merely with the liability of a master for the acts of a person employed by his servant, and was irrelevant as an authority, if its applicability be tested with reference to the law as it now stands.

The length to which the Chief Justice was prepared to go is further indicated by a subsequent passage in his opinion in which it was held that the owner of a house who was rebuilding or repairing it would be equally liable for the nuisance created by carrying a hoarding so far out as to encroach on the street, whether the work was done by his own servants or by a contractor.

The actual position of the court is equally apparent in the remarks made by the other judges.

Heath, J., said: "I found my opinion on this single point, viz.: That all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant; but being employed and trusted by the merchant, the latter according to the case in *Salkeld* is responsible for his acts."

Rooke, J., said: "He who has work going on for his benefit, and on his own premises, must be civilly answered for the acts of those whom he employs. According to the principle of the case in 2 Lev. it shall be intended by the court, that he has a control over all these persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the whole authority is originally derived, is the person who ought to be answerable and great inconvenience would follow if it were otherwise."

traceable in two *Nisi prius* rulings made a few years afterwards (*b*).

(*b*) *Doctrine that different rules apply to real and to personal property.*—It was not until 1826 that the points involved in *Bush v. Steinman* were again discussed by a court of review. In that year the judges of the King's Bench were equally divided as to the propriety of a nonsuit which had been directed by Abbott, Ch.J., in an action brought to recover damages for an injury caused by the negligent driving of a coachman who had been sent with a pair of horses which the defendant had hired from a jobmaster to draw his carriage (*c*). The extract given in the

(*b*) In *Sly v. Edgley* (1806) 6 Esp. 6, the plaintiff was allowed to recover for an injury received through falling into a sewer opened by a bricklayer when he had employed jointly with others. One of the points taken by defendant's counsel was that the bricklayer was not the servant of the defendant, for whose acts he might be made responsible; that, as he was employed to do a certain work, and the mode of doing it, which had caused the injury, was entirely his own act, he only should be liable. According to the report Lord Ellenborough disposed of this contention by the remark: "It was the rule of respondent superior; what the bricklayer did was by the defendant's direction; he had employed the bricklayer."

In *Mathews v. West London Waterworks Co.* (1813) 3 Campb. 403, where a verdict was obtained against a waterworks company for an injury resulting to the plaintiff from the negligence of men employed by certain pipe-layers, with whom the company had contracted for the laying down of certain water-pipes in a public street, Lord Ellenborough said he had "no doubt" as to the defendant's liability. The precise rationale of this ruling, however, is not very clearly apparent. The report is short and unsatisfactory, and the particular circumstances are not detailed. See the comments of Maule, J., in *Overton v. Freeman* (1832) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65.

(*c*) *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309. As the case was one of exceptional importance, and a difference of views developed itself among the judges of the King's Bench when the motion for a new trial was argued, it was ordered that the question submitted should be discussed before the whole body of the judges of the common law courts. The opinions finally delivered in the King's Bench, therefore, represent the results of an unusually exhaustive and searching examination of principles and authorities. It should be observed that two separate and distinct questions were suggested by the evidence, viz: (1) whether the effect of a contract of employment was to render the employer liable for the torts of the person employed, irrespective of whether the latter was a servant or a contractor, and (2) whether, supposing that no such general liability could be predicated, the coachman might be regarded as the special servant pro tempore of the defendant, as long as he was driving the carriage. Confining our attention to the former question, with which alone we are now concerned, we find that Holroyd and Bayley, JJ., were of the opinion that the nonsuit was erroneous, their reliance being placed upon *Bush v. Steinman*, which was considered to have established the general positions, that "responsibility is not confined to the immediate master or person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen." It should be noted that, in the case of the liability of the hirer of a job carriage for the negligence of the coachman who is sent with it was taken for granted by Heath, J., in his opinion.

note below from the opinion of Littledale, J., shows that, even the judges who at this period rejected the broad and unqualified principle enounced in *Bush v. Steinman* were still inclined to accept that decision as binding with respect to injuries resulting from the performance of work on or near the employer's premises. This doctrine, that an employer's liability is measured by different standards, according as the negligence complained of was committed in reference to real or personal property, was applied or recognized in several later cases, English as well as American (*d*).

opposite view was supported by Abbott, Ch.J., and Littledale, J. The former judge considered that if the defendant should be declared responsible simply on the ground of his having had the temporary use and benefit of the horses, it would follow that the hirer of a hackney carriage would be answerable for the negligence of the coachman, and the hirer of a wherry on a river would be answerable for the conduct of a wherryman. A doctrine which led to consequences by which "the common sense of mankind would be shocked" could not be sound. Littledale, J., referring to *Bush v. Steinman* and the decisions based upon it, said: "Supposing the cases to be rightly decided, there is this material distinction, that there the injury was done upon, or near, and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confirmed by the law to himself, and he should take care not to bring persons there who do any mischief to others It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same principle does not apply to personal moveable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is entrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner, to be conducted by other persons: the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it."

(*d*) In *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L. J. Exch. N.S. 308, 4 Jur. 969, in which the defendant was held not liable upon evidence in its general features was virtually identical with that presented in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309, Parke, B., incorporated in the judgment which he delivered for the whole court the essential portion of the extract quoted in note (*e*), *supra*, from the opinion of Littledale, J., and declared that the reasons given by him for making a distinction between the two classes of cases were satisfactory.

Two years afterwards in *Rapson v. Cubitt* (1842) 9 Mees. & W. 709, Car. & M. 64, 11 L.J. Exch. N.S. 271, 6 Jur. 606. the same judge again expressed his approval of the same doctrine, saying: "If a man has anything to be done on his

own premises, he must take care to injure no man in the mode of conducting the work." In view of the later English cases, it is somewhat curious that this dictum should have recently been referred to without any expression of disapproval by Smith, L.J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196.

In *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405, Lathrop, J., made the following remark: "Until the case of *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was decided, our decisions were in a somewhat anomalous state. Compare *Sprout v. Hemmingway* (1833) 14 Pick. 1, 5, 25 Am. Dec. 350, with *Stone v. Codman* (1834) 15 Pick. 297." In the former of these cases the owner of a vessel which was being towed was held not to be liable for a collision caused by the negligence of the crew of a tug-boat. Such a decision is in harmony with the modern rule, but the court cites *Bush v. Steinman* with approval, remarking that "it was decided principally on the ground, that the owner of real estate must be taken to be the employer of all those, who are engaged in making repairs for him; and that having the power to control and regulate the use of his own estate, he is bound to do it, in such a manner, that others may not be injured by the mode in which it is used." It is to be observed, moreover, that the court did not regard the contract for the towing as one of employment, but one which created relations similar to those which exist between a freighter and the crew of a general ship, or between a passenger and the crew of a packet. The defendants therefore were not regarded as "independent contractors" in the restricted sense in which that phrase is ordinarily used. In *Stone v. Codman*, the plaintiff was allowed to recover damages for an injury to his goods caused by water which escaped from a drain which was being dug from the defendant's house to a common sewer by a mason who procured the materials, and hired the labourers, charging a compensation for his services and disbursements. The decision was put expressly upon the ground that the relation of master and servant existed between the defendant and the mason, a conclusion which, according to the opinion in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, was deduced in a great measure from the fact that there was no contract, written or oral, by which the work was to be done for a specific price, or as a job. Compare cases cited in § 20, post.

In *Lowell v. Boston & L. R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33, the defendant was held liable for the damages which the plaintiff, a municipality, had been compelled to pay to a traveller who, as a result of the negligence of a contractor's workmen in omitting to replace the barriers which the plaintiff's agents had set up on each side of a cutting which had been opened through a highway, in the course of grading the defendant's roadbed, had driven into the excavation and suffered serious injuries. The court again expressed its approval of the decision in *Bush v. Steinman*, and took the broad ground that, as the work was done for the benefit of the company, under its authority, and by its direction, it was to be regarded as the principal, and that it was immaterial whether the work was done under contract for a stipulated sum or by workmen employed directly by the company at daily wages. This case was explained in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743, as being sustainable on the following grounds: that the corporation being intrusted by the legislature with the execution of a public work such as the building of the railway in question, was bound, while the work was in progress, to protect the public against danger; that it could not escape this responsibility by a delegation of its power to others; that the work was done on land appropriated to the purposes of the railway, and under the authority of the corporation, vested in them by law for the purpose; that the barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; that that servant had the care and supervision of them; and that the accident occurred through the negligence of a servant of the railroad corporation, acting under its express orders. The fact that *Bush v. Steinman* was expressly approved is disposed of with the passing remark that the decision of the case before the court did not involve the correctness of the rule in the case cited. The explanation thus given of the rationale of *Lowell v. Boston & L. R. Corp.* may be adequate to afford a justification for the decision on the special grounds enumerated. But it will be apparent to everyone who peruses p. 31 of the report in 23 Pick. that the court did not rely upon those special grounds, but upon the

(c) *Final rejection of this doctrine.*—That doubts as to the correctness of the doctrine reviewed in the preceding sub-section had been felt by some judges even at the time when its ascendancy seemed to be most assured, may be inferred from the fact that in 1840 Lord Denman intimated that he found great difficulty in accepting it (*dd*). At length, in 1849, it was definitely repudiated by a unanimous judgment of the Court of Exchequer. In the

broad rule embodied in the English case. From a consideration of the language used in these earlier Massachusetts decisions, it is apparent that the laboured attempt which was made in *Hilliard v. Richardson* to defend them merely adds one more to the long list of instances in which the courts have taken pains to demonstrate that the actual rulings in cases based upon discarded doctrines were, upon the evidence, reconcilable with the doctrines afterwards adopted.

In *Stone v. Cheshire R. Corp.* (1849) 19 N.H. 427, 51 Am. Dec. 192, a person injured by a rock which was thrown out of a blast set off by a contractor who was building a portion of a railroad was held entitled to recover on the ground that, "where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants." This case is virtually overruled in *Wright v. Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12, where, however, it was suggested that it might stand upon the same principle as *Lowell v. Boston & L.R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33, as that decision is explained in *Hilliard v. Richardson* (1855) 3 Gray, 349, 63 Am. Dec. 743. It is to be observed that, in this later New Hampshire case the court did not go to the length of categorically rejecting the doctrine that the owner of land is liable for acts which a contractor does upon that land for his benefit.

In *Wiswall v. Brinson* (1849) 32 N.C. (10 Ired. L.) 554, where the injury was caused by a hole in the street which a contractor employed to move a house had left uncovered, the plaintiff was held entitled to recover. The decision was put upon the ground that the stipulated work was to be done, "in respect to the defendant's property." Considering the date of this case, it is rather surprising to find in the opinion of the majority some language which indicated a more unqualified approval of *Bush v. Steinman* than is observable in any other case decided since *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.B. 309. Ruffin, Ch.J., dissented. So far as his conclusion was determined by the doctrine as to a distinction between real and personal property, it was based upon the theory, that the liability which is predicated with reference to that distinction takes effect only when the nuisance created by the contractor is actually on the premises of his employer. In other respects his opinion embodies what is now the generally received doctrine.

It will be noticed that, on the facts, both the New Hampshire and the North Carolina decisions might possibly be sustained on the ground that the employer was bound at his peril to see that appropriate precautions were taken to safeguard the public. See Subtitle V., post.

In *Memphis v. Lasser* (1849) 9 Humph. 757, the case of *Bush v. Steinman* was mentioned without any expression of disapproval, but the decision was really put upon the ground of a breach of a non-delegable duty.

Other American cases in which the distinction between the liabilities incident to the ownership or possession of real and of personal property is recognized more or less definitely are *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309; *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209. The allusion to the doctrine in the latter case is somewhat remarkable, as it had been expressly condemned in *De Forest v. Wright* (1852) 2 Mich. 36.

(*dd*) *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B. N.S. 19. The remarks of Parke, B., in *Quarman v. Burnett*, which had been decided earlier in the same year, were explicitly referred to.

course of his opinion, Rolfe, B., intimated that, under some circumstances, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by persons not standing in the relation of servants to him. But it was declared that, if any liability could be imputed on this ground, it must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. It was suggested that the decision in *Bush v. Steinman* might possibly be supported on some such principle as this. But even conceding this to be so, the doctrine could not be applied to the case before the court, as the wrongful act complained of could not in any possible sense be treated as a nuisance (e).

Within the next few years similar views were established by carefully considered cases in several of the United States (f). In

(e) *Reedie v. London & N.W.R. Co.* (1849) 4 Exch. 254, 6 Eng. Ry. & C. Cas. 184, 20 L.J. Exch. N.S. 65, where the defendant was held not to be liable for the negligence of the servants of a contractor in letting fall a stone from a bridge which was under construction. A few years latter it was observed by Parke, B., in *Gayford v. Nicholls* (1854) 9 Exch. 702, 2 C.L.R. 1066, 23 L.J. Exch. N.S. 205, 2 Week. Rep. 453, that the principle of *Bush v. Steinman* "cannot now be considered law."

(f) In *Blake v. Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304, it was held error to give an instruction by which the jury were in effect told that the person who undertakes the erection of a building, or other work for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of the servants of the builder or the person who is actually engaged in executing the whole work, under an independent employment, or a general contract for that purpose.

In *Barry v. St. Louis*, 17 Mo. 121, and *De Forrest v. Wright*, 2 Mich. 368, both decided in 1852, the doctrine of *Bush v. Steinman* was expressly disapproved.

In *Pack v. New York* (1853) 8 N.Y. 222, where the plaintiff's house was injured by a rock thrown up by a blast set off in the course of grading operations in a street, a charge to the effect that, if the jury believed that the contractor employed by the defendant to do the work had been guilty of negligence in blasting, and that injury to the plaintiff was caused by such negligence, the plaintiff was entitled to recover compensation for certain injuries specified by the Court, was held erroneous, inasmuch as it conflicted with the doctrine, "that a person who undertakes the erection of a building, or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servant, who is actually engaged in executing the whole work, under an independent employment or a general contract for that purpose."

In *Hilliard v. Richardson* (1855) 3 Gray 349, 63 Am. Dec. 743, the authorities were exhaustively examined and collated, and the doctrine of *Reedie v. London & N.W.R. Co.* was fully approved.

In *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345, the Court referring to this English decision, said: "The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction as to the liability of a party when he engaged a contractor to erect structures on his own premises, and when he engaged such contractor to erect them on the

the more recent American cases the ruling in *Bush v. Steinman*, whether viewed as one which embodies the broad principle that tortious acts committed in the course of his employment by a person who is doing work for the benefit of another are imputable to the latter, or as one which may be sustained on the ground that such a principle is applicable where the stipulated work is done on, near, or in respect to real property, has never been mentioned except with disapproval (g).

(a) *Effect of decision in Randleson v. Murray*.—During the period which saw the courts still hesitating as to the question whether a recognition should be accorded to the doctrine which draws a distinction between fixed and movable property, a case was decided which might seem to indicate a reversion to the much broader principle applied in *Bush v. Steinman* (h). From the

premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be entrusted to competent and skillful architects, there is no just reason why liability should attach to the proprietor for injuries occurring in its progress, any more than if such enterprise be executed on his own land, than if executed elsewhere."

(g) See *Myer v. Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719; *Lawrence v. Shipman* (1873) 39 Conn. 586; *Kellogg v. Payne* (1866) 21 Iowa, 575; *Robinson v. Webb* (1875) 11 Bush, 464; *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Clark v. Hannibal & St. J. R. Co.* (1865) 36 Mo. 203; *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352; *Independence v. Slack* (1895) 134 Mo. 66, 34 S.W. 1094; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *McCafferty v. Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; *Gourdier v. Cormack* (1853) 2 E. D. Smith, 254; *Hughes v. Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461; *Painter v. Pittsburgh* (1863) 46 Pa. 213; *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

(h) *Randleson v. Murray* (1838) 8 Ad. & El. 109, 2 Nev. & R. 239, 1 W.W. & H. 149, 7 L.J.Q.B.N.S. 132, 2 Jur. 324, was held liable upon the following evidence: The defendants, for the purpose of removing some barrels of flour from their warehouse, had employed one Wharton, who was a master porter in Liverpool, and who used his own tackle, and brought and paid his own men. Taylor, a master carter, was employed by Wharton to carry the barrels away; Taylor also sent his own carts, etc., and his own men, one of whom was the plaintiff. The injury to the plaintiff was occasioned by a barrel falling on him in consequence of part of Wharton's tackle failing while it was being used by Wharton's men. The defendant's counsel unsuccessfully contended that Wharton was a bailee for a special purpose, and contended that the remedy of the plaintiff was against him, not against the defendants. The subjoined extracts from the opinions will shew the grounds upon which the decision was based:

Lord Denman, Ch.J.—"Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative."

Littledale, J.—"It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case."

Patteson, J.—"The case of a carrier is quite distinct. He has goods in his custody as bailee."

language used by the judges, however, it is quite apparent that recovery was allowed for the reason that the person engaged to do the work and his servants were deemed to have been in the service of the defendant while the work was in progress (i). That such a conclusion would not be drawn by any court at the present day from similar evidence, would seem to be a reasonable inference from many of the decisions cited in § 12, post; though it must be admitted that the authorities are not entirely uniform. See § 23, post. But whether this surmise is correct or not, it is at all events manifest that the case is not one which exemplifies any theory respecting the limits of an employer's liability for a person who is determined to be an independent contractor (j).

(e) *Subsequent development of the law.*—From the foregoing review it will be apparent that, about the middle of the nineteenth century, almost every court which had had an opportunity of expressing its views had definitely discarded not merely the broad principle embodied in *Bush v. Steinman*, viz., that a person must answer for the torts of all those who are in his employ, whether they are servants or contractors, but also the qualified doctrine upon which it had been for some time supposed that that decision could be supported, viz., that a responsibility of this extent is imputable wherever the injury resulted from the execution of work on, near, or in respect to real property belonging to the employer. What may be regarded as the characteristic, as it is certainly the most important, feature of the doctrinal develop-

(i) That this was the standpoint of the court is also shewn by the following comment which was made upon the decision by Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B.N.S. 19; "The work was in effect done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one day by day, he did not thereby cease to be liable for injury done by the porter, while under his control." This explanation, which, it should be observed, proceeded from a member of the court which decided the case, shews that Parke, B., misapprehended the rationale of the case when, in *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, he intimated that it might be classed with those in which the occupiers of land or buildings have been held responsible for acts of "others than their servants," done upon, or near, or in respect of their property.

(j) It is not easy to determine what was the precise point of view from which Pollock, C.B., was speaking, when he remarked in *Murphy v. Caralzi* (1864) 3 Hurlst & C. 462, 34 L.J. Exch. N.S. 14, 10 Jur. N.S. 1206, 13 Week. Rep. 165, that "the case of *Randleson v. Murray* seems at variance with current of authority." He may have intended to express his disapproval of the decision as being an apparent recurrence to the doctrine of *Bush v. Steinman*, or he may merely have stated his opinion that, on the facts, the relation of master and servant was improperly inferred.

ments during the subsequent period is the gradual delimitation of the domain within which the general rule as to the non-liability of an employer for the torts of an independent contractor is controlled and overridden by the principle, that a person who is subject to an absolute duty cannot, by delegating it to another party, relieve himself from liability for injuries caused by its non-fulfilment. An examination of the cases cited in Sub-titles V., and VI., post, will show that the result of working out this principle in its application to certain situations has been the formation of several groups of precedents which, in any case involving similar facts, put a plaintiff, so far as his actual right of recovery is concerned, in a position which is very nearly, if not quite, as favourable as he would have occupied if the doctrine enounced in *Bush v. Steinman* had found a permanent place in Anglo-American jurisprudence (*k*). How far these encroachments upon the older doctrine of non-liability will be carried remains to be seen. In this respect the law is at present in a transition state. But in view of the trend of judicial opinion, as indicated by the most recent decisions, it seems perfectly safe to predict that, in some directions at least, the immunity of the employer will continue to be more and more abridged.

3. Rationale of the doctrine.—The doctrine enounced in § 1, ante, is frequently put upon the ground, that the characteristic incident of the relation created by an independent contract is, that the employer has not the power of controlling the person employed in respect to the details of the stipulated work, and that it is a necessary juridical consequence of this situation that the former should not be answerable for an injury resulting from the manner in which those details may be carried out by the latter (*a*).

(*k*) It seems certain, however, that a plaintiff now suing for injury received under the same circumstances as those involved in that case could not recover under any of the more recent doctrinal developments. The work was not intrinsically dangerous, nor was there a violation of any absolute duty which the employer was bound, at his peril, to see performed.

(*a*) The employer is not liable, "because he has employed an independent person, and has not retained any control over processes or details, nor even interfered in any way with the work at any stage." Wills, J., in *Holliday v. National Telephone Co.* [1899] 1 Q.B. 221, 227, 68 L.J.Q.B.N.S. 302.

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal cannot control his agent, he is not an

The doctrine has also been said to rest upon "the ground that a contractor, as between him and his employer, is responsible only for the fulfilment of his agreement, and, pending the performance of the work, is, to a certain extent, substituted for the party for whom the work is to be performed" (b). In this point of view any mischief which may have resulted from the performance of the work may be regarded as having been "done in the course, not of the employer's, but of the contractor's business" (c).

The doctrine has also been referred to as an application of the general principle, that, where an independent responsible cause is interposed between an alleged cause and the injury, the juridical connection between that alleged cause and the injury is broken (d).

None of these explanations, however, is adequate for the purposes of a fundamental inquiry, since they pre-suppose that an affirmative answer should be given to what is really the ultimate question to be decided, viz, the permissibility of allowing one person to depute to another a particular piece of work, on terms which will have the effect of relieving the former from the obligation of seeing that that work is executed with reasonable care and

agent, but holds some other or additional relation." *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

"The liability of one person for the negligent acts and omissions of another rests upon the relation of superior and subordinate as master and servant, and the consequent control which the superior has over the acts of the subordinate in the performance of his duties. There can be no liability, therefore, unless such relation and such right of control exist, either by force of contract between the parties, or the duty to assume control is imposed, as a matter of law, by reason of some peculiar relation the person for whom the work is being performed bears to third persons with respect to the time, place, and manner of performance." *Aldritt v. Gillette-Hersog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741.

"The liability of one person for damages arising from the negligence or misfeasance of another on the principle of respondeat superior is confined in its application to the relation of master and servant or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract." *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

"It seems to us that the doctrine would be productive of great wrong, to hold that when owners of real estate, who contract with reliable, competent and skilful builders, and deliver the premises into the actual exclusive possession of the contractors for a definite period, and when neither the contractors or their servants are under the control of the owners, that they must be liable for all the negligent acts of the contractors and their servants." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

(b) *Reynolds v. Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

(c) See the remarks of Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B.N.S. 19.

(d) Wharton, Neg. § 482.

skill. It seems clear from the not very numerous authorities which bear directly upon this question that the real, and in fact only available basis for the doctrine which declares such a delegation of functions to be under certain circumstances allowable is public policy (e). The juridical situation, therefore, would seem

(e) In the opinion delivered by Parke, B., for the whole court in *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, we find this passage: "The liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush v. Steinman* (1799) 1 Bosw. & P. 404, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men:' not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street." The remark of Lord Tenterden here referred to was made in his judgment in *Laugherv. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K.Q. 309.

In *Daniel v. Metropolitan R. Co.* (1871) L.R. 5 H.L. 45, 61, 40 L.J.C.P.N.S. 121, 24 L.T.N.S. 815, 20 Weekl. Rep. 37, Lord Westbury made the following remarks: "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons."

In *Wiswall v. Brinson* (1849) 32 N.C. (10 Ired. L.) 554 the non-liability of an employer for the torts of an independent contractor was said to constitute "an exception to the generality of the rule, [i.e., *Qui facit per alium facit per se*], made necessary by public convenience and general usage and when the reason of the rule does not so fully apply." The opinion then proceeds as follows: "When one enters a railroad car, the engineer and hands serve him—do work for him—carry him and his goods. But he is not liable for their negligence or want of skill. So far from it the company is liable to him. This is an exception to the rule, for two reasons; he did not make the selection, and although in a large sense they are his servants, yet they are the servants of the company. It carries on a distinct, independent business, and is liable for their negligence or want of skill. The reason of the rule fails; and public convenience demands, that the party injured should be content with his remedy against the company or the individual whose fault caused the injury. If passengers were liable, no one would travel upon railroads. This is the principle, upon which the exception is based. It extends to an infinite variety of cases. The one given is '*ex grege*'—it includes all who carry on independent trades or callings recognized as such by law or by common usage."

"To hold that a person is liable for all the damages resulting from the carelessness or negligence of all the servants or employees engaged in working for his benefit, although employed by contractors, without his knowledge or consent

to be simply this;—that the considerations of expediency which, according to the most generally accepted theory, constitute the only rational foundation of the rule which declares a master to be liable for the torts of his servant (*f*), are deemed to be inoperative, or to be superseded and overridden by other and antagonistic considerations of expediency, in some classes of cases where the person employed is exercising an independent business (*g*).

It has been strongly intimated in a recent New York case that, if a person is not competent to plan or carry out a piece of work, and yet attempts to do one of these things, he should be held responsible for an injury resulting from his having undertaken the charge of the work, and that it is his duty to devolve the planning and execution of the work upon persons possessing

and without any right or ability on his part to control or discharge them, might ruin any man in the world." *Kellogg v. Payne* (1866) 21 Iowa, 575.

In *Painter v. Pittsburgh* (1863) 46 Pa. 213, the court reasoned thus: "The verdict determines that the fault was all that of the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupation of the street in which the work is done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the public against injury from the work than can the officers of the municipal corporation. The public will be better protected if it be held that the contractor alone is responsible for his negligence, and that the city does not stand between him and any person injured. Thus he will be taught by caution, while a sufferer by the negligence of his servants will not be compelled to resort for compensation to the insolvent servants." It must be admitted, however, that the presumption entertained in this passage, that the protection of that part of the public which will be exposed to danger by the progress of a given piece of work will be more effectively secured by casting the responsibility on the contractor, is far from being axiomatic in its nature. If the maximum of protection is the object to be considered, it is, to say the least, probable that this end will be better attained by imposing liability both upon the employer and the contractor. It seems clear, however, that the rule as to the non-liability of employers has been formulated rather with reference to their interests than with reference to those of possible sufferers from the torts of the contractors.

(*f*) See *Gregory v. Hill* (1869) 8 So. Sess. Cas. (3rd series) 282; *Farmell v. Boston & W.R. Corp.* (1842) 4 Met. 55; 38 Am. Dec. 399; *Chicago & N.W.R.Co. v. Moranda* (1879) 93 Ill. 314, 34 Am. Rep. 168; *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321; *Coon v. Syracuse & U.R.Co.* (1849) 6 Barb. 231; *Carman v. Steubenville & I.R.Co.* (1854) 4 Ohio St. 399; Pollock's Essays in Jurisprudence, p. 116.

(*g*) There would seem to be plausible grounds for arguing that the exemption of an employer for the torts of a contractor should not be conceded without some restrictions in a case where the contractor himself is domiciled in a foreign jurisdiction. The inconvenience which is sometimes caused by compelling injured persons to obtain redress by following the contractor into another state is a serious evil. But the matter is one which can be dealt with only by the legislature. See the remarks of the court in *Sanford v. Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

sufficient knowledge and skill to accomplish what is contemplated without endangering the workmen and the public (*h*). Such a doctrine is doubtless in harmony with the general conception of legal negligence, as being "the absence of care according to the circumstances" (*i*). But it cannot be said to supply an adequate reason for exempting the employer from liability for the torts of the person whom he engages to perform the work. The existence of an obligation to appoint a substitute under the supposed circumstances is by no means incompatible with the existence of an obligation to answer for the acts and omissions of that substitute. See cases cited in § 59, note (*h*), post.

4. Extent of the employer's duty with respect to the supervision and direction of the work.—That an employer is not bound to supervise the progress of contract work, for the purpose of preventing the commission of collateral torts by the contractor, is well settled (*a*). This doctrine may be regarded as one which is

(*h*) *Burke v. Ireland* (1901) 166 N.Y. 305, 59 N.E. 914.

(*i*) *Vaughan v. Taff Vale R. Co.* (1860) 5 Hurlst & N. 679, 688, 29 L.J. Exch. N.S. 247, 6 Jur. N.S. 899, L.T.N.S. 394, 8 Week Rep. 549, per Willes, J.

(*a*) In *Braidwood v. Bonnington Sugar Ref. Co.* (1886) 2 Sc. L.R. 152, it was argued, as a ground for imputing liability to the defenders, that "they did not so far separate themselves from those whom they employed and that they had an inspector looking after their interests." The reply made to this contention was as follows: "That makes no difference; the inspector failed in no duty which he was bound as the defenders' representative to discharge to the deceased. He was not there to attend to the interests of the deceased, or to any duty of the defenders to the deceased. The Company was not bound to have an inspector there, and it did not send him there to protect his [i.e., the decedent's] interests. Anything he failed to do he was answerable for to the Company and to no one else. He might be personally, no doubt, for his own delinquency but he could not bind the defenders."

Where the owner of a building contracts with a stair builder for the reconstruction of his stairway therein, and such stair builder has entire control of the stairway for the purpose of work, it is not the duty of the owner to see that cleats placed on the stairs, to protect them from injury before being painted, are properly placed there by the contractor's servant. *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

A church society engaging a contractor to repair its church tower is not under the positive duty to see that such contractor leaves a shutter in the tower in an apparently safe condition, where he has loosened and rendered it insecure in the erection or removal of a scaffold erected for such repairs. *Woods v. Trinity Parish* (1893) 21 D.C. 540.

A railway company which contracts for the erection of a train shed is not under a duty to see that the workmen in the employ of the contractor and sub-contractors handle their tools with reasonable care. *Fitzpatrick v. Chicago & W. I. R. Co.* (1888) 31 Ill. App. 649 (tool fell on trainman.)

A person for whom a building is being erected by a contractor is not under any duty or obligation to see that a sub-contractor does not deposit materials in a public street. *Aldritt v. Gillette-Hersog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741.

In a case where water flowed into the plaintiff's cellar in consequence of the manner in which sub-contractor constructed a vault and side-walk in front of a building, the court concurred with the finding of a referee that the principal contractor was not liable for the resulting damage, as he was under no obligation by his contract to give any direction as to this portion of the work, and had no control or authority over the mode or manner of its performance, but only a right to insist generally that the work be done according to the terms of the contract. *Slater v. Mersereau* (1876) 64 N.Y. 158.

In *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032. The court said: "There is no authority for the proposition that the employment of an architect to make plans and specifications for work of this character and to supervise the work in its progress to completion is a legal duty owing by the employer either to the contractor or to third persons. We are not aware of any such rule of law. An architect is usually retained for the protection of the proprietor. If there was no negligence imputable to the proprietor in the employment of the contractor, or negligence in other respects, the failure to employ an architect does not constitute a breach of duty owing to the public, and is no evidence of negligence in the execution of the work." The following passage from 2 Thomp. Neg. § 41, was quoted with approval: "The proprietor usually retains control by a skilled architect, not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor, step by step, as the work progresses."

In *Burke v. Ireland* (1901) 166 N.Y. 305, 39 N.E. 914, rev'g (1900) 47 App. Div. 428, 62 N.Y. Supp. 453, it was shewn that the defendant employed a competent architect to draw the plans and specifications for a building, which were approved by that department of the city government which had charge of the matter, and there was no ground for affirming that he interfered with the plans, or reserved or exercised any right to change them. The work of constructing the building, including the foundations, he also committed to a competent contractor. But the foreman made the mistake of placing the central column, which supported the upper part of the building, upon an insecure foundation, not constructed in accordance with the specifications, the result being that the building collapsed and the plaintiff's intestate lost his life. The court explained as follows its reasons for denying the liability of the defendant: "If it be true that the owner was bound at his peril to see to it that the foundation of the iron column was laid upon solid ground, then it would be difficult to avoid the conclusion that the result of the accident could be attributed to the omission of the defendant in that respect. But we think that this was an obligation which the owner could devolve upon an independent contractor, and it requires only a fair construction of the contract to shew that it was placed upon the builder, for whose omissions or mistakes the defendant is not responsible. There is no proof in the case from which the jury could find that the accident resulted from any defect in the plan. The death of the plaintiff's intestate was caused by a defective execution of the plan which the contractor agreed to carry out. The central column, which was intended to support the building, was placed upon an unsafe foundation, and this was the direct or proximate cause of the calamity. If the architect, who had general supervision, had insisted upon a careful inspection of every detail of the work and had been present when the concrete was about to be laid upon the disturbed ground outside the old cistern wall, he might have discovered the departure from the terms of the contract in that respect and prevented it. But the architect was not the agent or servant of the owner. He was in the exercise of an independent calling and held the same legal relations to the defendant that the builder did, and for the omissions of either in the execution of the plans, personal negligence cannot be imputed to the defendant."

The view thus taken of the evidence was radically different from that which was adopted by the Supreme Court, which proceeded upon the theory that the architect was the defendant's agent, and that, as one of the two contracts which it was necessary to consider in relation to the incidence of the liability did not require anything further than not to lay the concrete in the trenches until they had been inspected by the architect, while the other contract made no provision with respect to the depth of any excavation required to procure a good bottom, if further excavation was necessary beyond that for which the plans called, the duty of

deducible directly from the legal conception of an independent contractor, as being essentially a person who, *ex hypothesi*, is entitled to exercise his own discretion with regard to the manner in which the results which he has undertaken to produce shall be achieved. Or it may be put upon the ground, that the employer is entitled to act upon the presumption that a contractor who has been carefully selected will exercise reasonable skill and prudence in executing the stipulated work (b).

determining the depth to which the excavation should extend devolved upon the defendant or his agents. First appeal (1898) 26 App. Div. 487, 50 N. Y. Supp. 369; second appeal (1900) 47 App. Div. 428, 62 N. Y. Supp. 453.

The following passage contains the gist of the opinion delivered on the second appeal: "Behrens [the architect] not only prepared the plans, but he superintended the construction. When a point was reached where it became necessary to determine what should be the proper depth of the excavation for a secure foundation, such question must be held to have been work within the owner's control, for the performance of which, by the agent selected by him, he was responsible. (*Vogel v. New York* (1883) 92 N. Y. 10, 44 Am. Rep. 349.) The primary duty resting upon the defendant Ireland was to secure a sure foundation for his building, and he ought to have known—at least he is chargeable with the knowledge essential for him to perform the duty properly (sic). As he did not contract with any contractor for a specific depth to which the foundation should be carried, and as the architect had no power or authority to change or modify his plans, the duty of determining what should be done on account of the infirmity of the soil was one which devolved directly upon the defendant, Ireland, and the architect in this respect occupied the relation to Ireland of an ordinary agent. For his failure to properly perform his duty in that regard the defendant, Ireland, is chargeable."

On the first appeal the Supreme Court had also laid it down that one who contracts with an independent contractor for the construction of a building upon his property does not guarantee to third persons that the contractor will comply with the building laws, as such laws merely limit the existing rights of the owner to improve his property, and do not confer any new rights. *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N. Y. Supp. 369. This point was not referred by the Court of Appeals.

A complaint which shows by its averments that the tortious act which was the immediate cause of injury was collateral in its nature, and was committed by a person who bore to the defendant the relation of an independent contractor, cannot be made proof against a demurrer by inserting an allegation that it was the legal duty of the defendant to examine from time to time the condition of the place where the work was being done, and to provide suitable material for making that examination. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663. Affirming (1899) 93 Me. 17, 44 Atl. 121.

See also *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, § 5, note (a), post.

(b) The justifiability of this presumption is adverted to by Lord Westbury in the passage quoted in § 3, ante, note (e), from his judgment in *Daniel v. Metropolitan R. Co.* (1871) L. R. 5, H. L. 45, 61, 40 L. J. C. P. N. S. 121, 24 L. T. N. S. 815, 20 Weekl. Rep. 37.

In *Butler v. Hunter* (1862) 7 Hurlst & N. 825, 31 L. J., Exch. N. S. 214, 10 Weekl. Rep. 214, plaintiff's counsel argued in substance, that, where a person employs a tradesman to do work which may be dangerous to another (here the making of an excavation on land adjacent to a house), he is bound to show that he directed all care to be taken, and specifically pointed out in what was the danger which was to be guarded against, or, at all events, to show that he did enough to exempt himself from responsibility. But Pollock, Ch. B., rejected this

On the other hand, it is clear that, in cases of the types discussed in Sub-titles V. and VI., post, what the law virtually declares is that the employer must, at his peril, see that the work is executed with reasonable care; and his liability is sometimes discussed under this aspect (c).

contention, saying: "It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief." Wilde, B., also observed: "It is said that the defendant ought to have given orders to do the work in a tradesman-like way, or ought to have pointed out what was requisite. But it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesman-like way." This case is referred to as an illustration of the general principle embodied in the above quotation. The decision itself has been virtually overruled. See § 52, note (a), post.

"When the contract is to do an act in itself lawful, it is presumed that it is to be done in a lawful manner." *Eaton v. European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Carter v. Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572.

In *Independence v. Slack* (1895) 134 Mo. 66, 34 S.W. 1094, where it was held that land owners who make a contract with another person to provide the materials and construct a sidewalk in front of their premises are not liable for an injury caused by stones and other obstructions negligently left in the street by the contractor, the Court reasoned thus: "We know of no principle of law that imposes a legal obligation upon the owner of property adjacent to a public street to see that no obstructions to travel are placed or suffered to remain thereon, nor is there evidence of a contract with, or license from, the city which placed defendants under any peculiar obligation to keep the street secure while they were improving their property. Defendants were, of course, responsible for what they did themselves or directed others to do, but the contract in question did not necessarily, or, probably, involve the commission of a nuisance, and cannot, therefore, be constructed as a direction by defendants to commit the negligent acts of which complaint is made. They had the right to make the contract, and to believe that the work would be done carefully in all respects, and after they had committed it to Stewart, duty did not require them to interpose, and see that the methods adopted were careful and proper."

(c) In *Hole v. Sittingborne & S. R. Co.* (1861) 6 Hurlst & N. 488, 31 L. J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Weekl. Rep. 274, which was decided on the grounds explained in §46, post. Pollock, C. B., in the following passage noticed an alternative conception to which the liability of the defendant might be referred. "I suggested, in the course of the argument that, where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done—to know what is the plan—to see that the materials are good, and to take care that no mischief ensues. So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do—what materials he would use, and to have seen that the specification and the materials were such as would ensure the construction of a proper and efficient bridge."

In *Dalton v. Angus* (1881) 6 L.R. App. Cas. 829, 50 L.J.Q.B.N.S. 689, 44 L.T. N.S. 844, Weekl. Rep. 196, Lord Blackburn said in the course of his opinion: "A person causing something to be done the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to the contractor."

The existence of a duty of supervision is occasionally inferred from the terms of some statutory provision which regulates the performance of the work in question (*d*), or from some explicit stipulation in the contract (*e*).

According to Lindley, L. J., in *Hardaker v. Idle Dist. Council* (1896), Q. B. 342, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196, the effect of what was said by Lords Blackburn and Watson in *Hughes v. Percival* (1883) L.R. 8 App. Cas. 443, 446, 449, 52 L. 8 J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Weekl. Rep. 725, 47 J.P. 772, was that where the work is of an intrinsically dangerous character, the employer's duty is to see that the contractor does his work properly.

For other cases in which the duty of exercising supervision is predicated specifically with respect to work which involved the performance of absolute duties which were incumbent on the employer, see *O'Brien v. Board of Land & Works* (1880) 6 Vict. L.R. (L.) 204; 2 Australian Law Times 22; *Williams v. Tripp* (1878) 11 R. I. 447; *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

(*d*) Where the charter of a city requires the Board of Public Works to take charge of the erection of public buildings it is their duty to see, through their architect or otherwise, that the work on every building of that description is performed according to the plans and specifications adopted by the common council. *Chicago v. Dermody* (1871) 61 Ill. 431. The court said: "If those having charge of the construction or repair of streets, bridges, etc., permit obstructions, pits or other dangerous places, to be made in the streets by the contractor without being properly guarded, the city is liable for injury that may ensue, because the work is in charge of the proper city officer, and is being done by the authority of the city. Nor is it an answer in such a case to say the contractor departed from his contract or violated the city ordinances in performing the work, as it is the duty of the officer having charge of the improvement to see that the plans are pursued and the proper precautions taken to secure the safety of the public; and it is negligence on the part of such officers in failing to see that they are adopted. And the same rule must prevail where the city or its officers have charge of the erection of a public building for the use of the city."

It should be noted that, under such circumstances as these, the work is assumed to be under the employer's control; while it is in progress, and the liability which he incurs by reason of a failure to perform the duty of supervision might equally well be referred to the conception that the contractor is in point of law his servant (see § 18, et. seq.), or to the conception that he is constructively, if not actually, directing the operations.

(*e*) *Slater v. Mersereau* (1876) 64 N.Y. 138, a referee had found that the waters which flowed into the cellar of the building and injured the plaintiffs came from the roof by reason of the failure of the defendant to direct the sub-contractors to make the necessary cuttings in the wall for the waste pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain water. Discussing the effect of this finding in connection with a clause in the contract with the sub-contractors which provided that they should do all the cutting away for repairing after plumbing, etc., as "they should be directed," the court said: "It necessarily follows from the terms of the contract that the defendant was bound to give such directions as were required to prepare the same, and upon a failure to do so that he should be held responsible for the damages which ensued by reason of his neglect in this respect. According to this condition, the defendant exercised a supervisory control over the progress of the work, and it was part of his duty to see that it was conducted properly, and with the exercise of ordinary care and skill, so as to prevent injuries to other parties."

On the ground that it was provided in the contract for the erection of a building, that partitions, etc., were to be taken down or filled up as may be required, and anchored where directed, it was held that the directions were to be

5. **Extent of duty of employer to guard against possible accidents.**—It is sufficiently manifest, that the virtual abrogation of the doctrine now under discussion would result, if the law were to predicate, in respect to all kinds of work indifferently, the existence of an absolute duty on the employer's part to guard against all accidents, probable as well as improbable, that may happen to the damage of third persons, while that work was being performed by an independent contractor (a). If, therefore, recovery is sought on the ground that the employer ought to have adopted certain precautionary measures for the purpose of preventing the injury complained of, the action will fail, unless the plaintiff can at least show that in view of the nature of the work, and the conditions under which it was to be executed the defendant should have foreseen that the actual catastrophe which occurred was likely to happen, if those precautionary measures were omitted. Whether the production of evidence to this effect will entitle him to go to the jury upon the question whether the employer ought to have provided for the protection of the public was a point which elicited different opinions in the case cited below. But it seems to be a reasonable inference from the more recent decisions cited in Sub-title V., post, that this point should be decided in the plaintiff's favour (b).

given by the owners. *Lancaster v. Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 5 S.W. 23.

Compare also the cases cited in § 66, post.

(a) In *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, where a horse was frightened by the whistle of a steam-engine, used for the purpose of hauling along the defendants' track cars belonging to a contractor, and loaded with materials which were to be used by him for the repair of a turnpike road, the court reasoned as follows: "It would be carrying the obligation of the Turnpike Company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White [the contractor] were not thus negligent, although the use of the steam engine was not a nuisance per se, and could be operated so as not likely to do any injury to any one using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful, and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to and not a probable consequence of the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants."

(b) In *Pearson v. Cox* (C.A. 1877) L.R. 2 C.P. Div. 369, 36 L.T.N.S. 495, the defendants were builders and contractors who, after the outside of a house was finished, had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house

An employer cannot be charged with liability on the theory that it is his duty to insert in a contract an affirmative provision to the effect that the contractor shall not be guilty of negligence. "The law always implies that every person who is authorized to do any act which, if it is done improperly, may injure his neighbour, will do that act without negligence, and such an

and the tool in falling injured the plaintiff, who was passing along the highway. The jury found that the boarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. Upon this finding it was held that the defendants were entitled to judgment. Commenting upon the doctrine propounded by the plaintiff's counsel that there was a general duty imposed upon the defendants to guard against accidents, Coleridge, Ch. J., said: "That must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding some one liable; but if any one is liable for not providing some protection, it would be the sub-contractor."

Bramwell, L. J., said: "I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendant would be that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers by were guarded against the results. It may be that when a house is being built there is a probability that tools or other things will fall, and the jury might be justified, either upon the evidence of experts or from knowledge of common life, and without experts being called, in finding that some protection to the public must be afforded. But however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general dangers in the course of the building, but this, according to the opinion of the jury, is not such an accident. But even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going to leave off, and how the work will be done; and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that some one ought to have provided against the danger, the last link in the chain fails: it is the plasterer who ought to have provided against it, and not these defendants."

Brett, L. J., said: "The negligence alleged was that the boarding ought to have been kept up or that there ought to have been some protection at the window, but there was no evidence that the tool fell by the negligence of any one—no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether some one ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents."

See also the passage quoted in § 48, post, from the opinion of Lord Watson in *Hughes v. Percival* (1883) L.R. 8 App. Cas. 443, 52 L.J.Q.B.N.S. 719, 49 L.T.N.S. 189, 31 Weekl. Rep. 729, 47 J.P. 772.

implication is a necessary part of every contract" (c). Still less can an employer be held responsible on the ground that the injury was a natural and probable result of his contract, where that instrument expressly provides that the stipulated work shall be carefully done, and the injury complained of would not have occurred had that provision been observed (d).

II. WHEN THE PERSON EMPLOYED IS DEEMED TO BE AN INDEPENDENT CONTRACTOR.

6. Independent contractors distinguished from servants and agents. Generally.—The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed (a). This attribute of the relation supplies, as is apparent from the ensuing sections of this sub-title, the single and universally applicable test by which the servants are distinguished from independent contractors. But there is also high authority for the doctrine, that the possession or non-possession of the right of control may, in some instances, determine whether the person employed was a servant or an

(c) *White v. New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454, holding a complaint to be demurrable which was based upon the theory that the failure of a city to include in a contract with an independent contractor for the improvement and grading of a street a provision that the contractor should care for and remove all surface water, sewage and drainage which would be interfered with by such grading, rendered it liable for the negligence of such contractor in failing to provide for the removal of surface water and sewage.

In *Ashton v. Nolan* (1883) 63 Cal. 269, it was urged that it was the duty of defendant to insert in the contract an express term, to the effect that the work should be so conducted and finished as not to disturb the soil of the adjacent lot, and that in default of such express provision the defendant was liable, because the work was done in accordance with the contract. The court, however, said: "When a contract provides for doing a thing which may be, and generally is, done in a lawful manner and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, the injury was done in violation of his contract."

(d) *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499.

(a) "A servant is a person subject to the command of his master as to the manner in which he shall do his work." *Yewens v. Noakes* (1880) L.R. 6 Q. B.

agent (*b*). Assuming that authority to be unimpeachable, it is clear that the exercise or non-exercise of the right by the employer is not an available element for the purposes of differentiation, where it is a question of distinguishing between agents and independent contractors (*c*). In the absence of any judicial

Div. 532, 50 L.J. Q.B.N.S. 132, 44 L.T.N.S. 128, 28 Weekl. Rep. 562, 45 J.P. 8, per Bramwell, L.J.

To the same effect is the following sentence in a letter which the same distinguished judge wrote to Sir Henry Jackson at the time when the English Employers' Liability Act of 1880 was under discussion: "The relation of master and servant exists where the master cannot only order the work, but how it shall be done. When the person to do the work may do as he pleases, then such person is not a servant."

"The test is very much like this, viz., whether the person charged [i.e., with embezzlement] is under the control and bound to obey the orders of another." *Reg. v. Negus* (1873) L.R. 2, C.C. 37, 42 L.J., Mag. Cas. N.S. 62, 28 L.T.N.S. 646, 21 Weekl. Rep. 687, 12 Cox C.C. 492, per Lord Blackburn.

"Does not the word 'clerk' or 'servant' imply the existence in some one of a power of control." Cockburn, Ch. J. in *Reg. v. May*, (1861) Leigh & C.C.C. 13, 33 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 686, 9 Weekl. Rep. 256, 8 Cox C.C. 421.

"The relation of master and servant exists, whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, 'not only what shall be done, but how it shall be done.'" *Singer Mfg. Co. v. Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

"The relation [of master and servant] exists where the employer selects the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance." *Butler v. Townsend* (1891) 126 N.Y. 105, 26 N.E. 1017.

"A master is one who not only prescribes the end, but directs, or any time may direct, the means and methods of doing the work." *Bailey v. Troy & B.R. Co.* (1884) 57 Vt. 252, 52 Am. Rep. 129.

See also the definitions in Stephen's Digest Crim. Law, 220; New York Code, § 1034; Cal. Civil Code, § 2009; Dakota Civil Code, § 1157.

(*b*) "It seems to me that the difference between the relations of master and servant, and principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." Bramwell, B., in *Reg. v. Walker* (1858) 27 L.J. Mag. Cas. N.S. 208, Dears. & B.C.C. 600, 4 Jur. N.S. 465, 6 Weekl. Rep. 505, 8 Cox C.C. 1. These words are reported only in the Law Journal, but they embody the doctrine applied in the decision itself, and therefore express the opinion of the whole court.

(*c*) The above statement of Bramwell, B., was, it seems, overlooked by Mr. Bowstead, when he expressed the opinion that "the difference between an agent and an independent contractor is, that an agent undertakes to act in the matter of the agency subject to the directions and control of his employer, whereas an independent contractor does not, but contracts to perform certain specified work, or produces certain specified results, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract" Law of Agency, p. 3, note (*a*); Encyclopædia of the Laws of England, sub voc. Principal and Agent, p. 338. This assertion may be correct as regards some classes of agents, but it is clear that others, such as attorneys at law, factors, brokers, and auctioneers, have quite as much liberty of action in their respective employments as is accorded to independent contractors.

In this connection it is important to observe that, if language is to be construed in its ordinary sense, such agents as those just mentioned would fall within

discussion bearing directly upon the problem thus indicated it is with much diffidence that the writer ventures to suggest that these two classes of employ  s can be discriminated, if at all, only by considering their position with reference to the character of the work which is normally entrusted to them. An agent is ordinarily appointed to represent his principal in some transaction or transactions arising out of business, trade, or commerce (*d*). Not infrequently the discharge of such functions by an agent may also involve the performance of a considerable amount of manual labour, by himself or others, in dealing with various material substances; but such operations are merely an incidental result of the execution of his agreement (*e*). On the other hand it is clear that operations of this character have formed the subject of the undertaking in the great majority of the cases in which the rights and liabilities arising out of the employment of independent contractors have been discussed. If, therefore, the terms "agent" and "independent contractor" are to be considered as having relation to two entirely separate regions of fact, this circumstance may possibly be taken as the distinctive factor which in any given case will determine the class to which the employ  e should be assigned.

the scope of the alternative phraseology by which independent contractors are frequently described—as where they are spoken of as persons who are exercising, pursuing, carrying on, or engaged in an "independent employment." (*Sadler v. Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q.B.N.S. 138, 1 Jur. N.S. 77, 3 Week. Rep. 181, 3 C.L.R. 760; *Carter v. Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572; *Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776; *Robinson v. Webb* (1875) 11 Bush 464; *Deford v. State* (1868) 30 Md. 179; *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376; *Pierrepoint v. Loveless* (1878) 72 N.Y. 211; *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Harrison v. Collins* (1875) 86 Pa. 153, 27 Am. Rep. 699; *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691; *Bibb v. Norfolk & W.R. Co.* (1891), 87 Va. 711, 14 S.E. 163); or, "a special employment" (*Murray v. Currie* (1870) L.R.C.P. 26, 40 L.J.C.P. 26, 23 L.T.N.S. 557, 19 Week. Rep. 104); or, "an independent business" (*Allen v. Hayward* (1845) 7 Q.B. 960, 10 Jur. 92, 15 L.J.Q.B.N.S. 99, 4 Eng. Ry. & C. Cas. 104; *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q.B.N.S. 138, 1 Jur. N.S. 677, 3 Week. Rep. 181, 3 C.L.R. 760; *McCarthy v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320; *Uppington v. New York* (1901) 165 N.Y. 222, 43 L.R.A. 550, 59 N.E. 91; *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N.W. 58); or, as being "in the exercise of an independent and distinct employment" (*De Forrest v. Wright* (1852), 2 Mich. 368; *Linton v. Smith* (1857) 8 Gray, 147); or, as "prosecuting an occupation having some independence" (*Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403).

(*d*) This particular indicium of the relation is emphasized in definitions of "agent" which are given in II. Kent Com. p. 784; Wharton, Agency, § 1; Mechem, Agency, § 1.

(*e*) Such situations may, and often do, occur in connection with the transactions of auctioneers and factors.

An alternative view for which there is some authority would treat independent contractors as being one particular species of agents (*f*). The method of classification thus indicated is doubtless inadmissible, where it is a question of the scope of a criminal statute, and the doctrine of strict construction is necessarily observed. But, so far as civil actions are concerned, there would seem to be no logical objection to taking as the element which fixes the character of the employment that aspect of an independent contractor's position which exhibits him as a substitute or deputy of the contractee in respect to the performance of the stipulated work. In this point of view an independent contractor will be simply an agent whose employment does not carry with it certain incidents by which it is normally attended, and he may be conceived as being distinguishable from other kinds of agents by the diagnostic mark which is referred to in the last paragraph.

It is impossible, however, to affirm that the very vague criterion thus suggested for purposes of differentiation is one of universal applicability, or that it is habitually recognized or taken into account by the courts. Indeed cases are not wanting in which employers have been held liable on the specific ground that the tort-feasor was a servant, and not an independent contractor, although, so far as can be seen, the facts involved were such that this conclusion might equally well have been reached through the application of the principles of the law of agency (*g*).

7.—Persons acting in the dual capacity of contractor and servant or agent.—In all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, or master and servant. But there is not

(*f*) That a contractor may be said to be "in one sense an agent" of his employe was conceded by Willes, J. in *Murray v. Currie* (1870) L.R. 6, C.P. 26, 40 L.J.C.P. 26, 23 L.T.N.S. 557, 19 Weekl. R. 104.

(*g*) Thus in two instances the question whether the negligence of employes belonging to the class of "travelling agents" should be imputed to their employers was discussed solely with reference to the question, whether they were servants or independent contractors, and recovery was allowed on the ground that the terms of their contract shewed them to be servants, and that their negligence in the management of the teams and vehicles used by them for the purpose of carrying about the commodities which they were selling was therefore imputable to their employers. *Singer Mfg. Co. v. Rahn* (1889) 122 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55. Here it would seem that their representative capacity, as agents, would have justified a similar conclusion, without raising the question, whether they were servants.

necessarily such a repugnance between them that they cannot exist together (a). Hence the fact that an employ   was a servant as respects one part of the functions discharged by him will not involve the consequence, that the employer must answer for injuries caused by an act of negligence committed by such employ  , while he was engaged in work which he had undertaken as an independent contractor (b).

(a) *Detroit v. Corey* (1861) 9 Mich. 165, 80 Am. Dec. 78, where a person was injured by falling into an open sewer left unguarded by contractors. The Court said: "In the case before us, both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets which are public highways. They had no right to make the excavation they did, except as agents for the city; and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract."

(b) A railway company entered into a contract with A. to construct a branch line; who contracted with B. to erect a tubular bridge, a part of the works. B. had a surveyor C. whom he paid by a salary of £250 a year to attend to his general business, and after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive £40. irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers by, D. stumbled over the pole and was injured; subsequently to which additional lights were placed on the spot, and B. paid for them: Held, that B. was not liable, and that D.'s remedy lay against C. *Knight v. Fox* (1850) 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. N.S. 9. During the argument of counsel the following remarks were made: Parke, B.—"But as to this contract, in the management of the erection and fitting up the scaffolding, he was not their servant. It is like the case of a gentleman who enters into a particular and distinct contract with his servant to supply him job horses." Alderson, B.—"Suppose this contract had been with a third person, instead of with Cochrane, there would be no doubt, in such case, that the defendants could not be liable for this accident. Then how does the fact of Cochrane being their general servant or surveyor make any difference." The former judge also used this language in his opinion: "The act complained of was not an act done by Cochrane in the character of a servant to the defendants. It may be too much even to say that he was their servant in any point of view, for he acted as a contractor or surveyor for them, at a yearly salary of £250, which he received in lieu of payment for each separate piece of work. Therefore the case, which rests upon the negligence arising out of the construction of the scaffold, is precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work." The significance of the fact that the lights were placed by the defendants after the accident was thus discussed by Pollock, C. B.: "This case is distinguishable from *Burgess v. Gray* (1845) 1 C.B. 578, 14 L.J.C. P.N.S. 184. There, a single matter—an admission by the defendant—which was unexplained by other testimony, was put to the jury; and possibly, if we knew nothing more of these lights than that the defendants paid for them when they were put up after the accident, it might be some slight evidence for the jury of the liability of the defendants. But upon the evidence here, the fact is explained by the circumstances that Cochrane was not to find any of the materials for the bridge, and that he had made a contract that the defendants were to find the materials for it, but that he was to furnish the labour, and was to receive a specific sum for that job; and that this particular contract formed no part of, and had nothing to do with, his general employment by the defendants; and that those lights were so paid for, as forming a part of the materials supplied."

8. Contractors not within purview of statutes relating to servants or agents.—The reports contain a considerable number of decisions which illustrate in one form or another the principle, that independent contractors are not within the purview of statutes which their scope and phraseology show to be applicable only to servants or agents (*a*). But a meaning sufficiently com-

Defendant's farm superintendent, who was also a member of a hardware firm, directed an employé of the firm to go to the farm, and repair a leak in a distillate tank, one of the appliances of the farm. By reason of the negligence of such employee in lowering a light into the tank an explosion occurred, by which plaintiff's decedent, a farm servant of defendant, was killed. Held, that the hardware firm, notwithstanding the connection of defendant's superintendent therewith, was an independent contractor. *Hedge v. Williams* (1901) 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

That the employé in question was a contractor for the carpentry-work only on a building, and that, as to the residue of the work, he was merely the superintendent or agent of the defendant, was held in a case where the uncontradicted testimony of the employé himself was to the effect, that the defendant engaged him to put up the entire building, employ all the men, and indorse all their bills; that he engaged to do the carpentry-work at twenty-seven cents on the bill, and employ all the mechanics, etc.; that the defendant employed no one about the building; that he gave the employé possession of the ground, which he was to keep until the contract was executed; that the defendant was at the place of work once or twice a day, and gave him directions to keep everything safe; and that he had nothing to do with the mechanics. *Samyn v. McClosky* (1853) 2 Ohio St. 536.

In a New York case it was laid down that, even if it should be regarded as a legitimate inference from the testimony, that the principal contractor was acting as the agent of the employer in negotiating certain sub-contracts, including that which was made with the person whose negligence was the cause of the injury, the mere fact that the principal contractor undertook such functions would not enlarge the liability of the employer for the negligence of those sub-contractors, since it was also shown that, in making the sub-contracts, the employer dealt directly with the sub-contractors themselves. *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

(*a*) The servants of a contractor are not entitled to sue the principal employer under the provisions of the English Employers' Liability Act. See the cases cited in § 721a of the present writer's treatise on Master and Servant.

This rule also prevails in all the British Colonies which have adopted that Act, except Ontario and British Columbia, where special provisions for the benefit of such servants have been inserted. See the treatise just mentioned.

A similar doctrine has been laid down in Alabama, where a statute closely resembling the English Act is in force. *Harris v. McNamara* (1893) 97 Ala. 181, 12 So. 103. It would doubtless be also applied in any other of the American States which have legislated on the same lines. But in Massachusetts, a special provision of the same tenor as those enacted in Ontario and British Columbia is now in force.

A contractor with the Minister of Railways and Canals, as representing the crown, for the construction of a branch of the Intercolonial Railway, is not an "employé" of the Railways and Canals Department of Canada within sec. 109, of the Government Railway Act of 1881, (44 Vic. chap. 25), requiring actions against any officer, employé or servant of the department for anything done by virtue of his employment to be brought within three months after, and upon one month's previous notice in writing. *Kearney v. Oakes* (1890) 18 Can. Sup. 148, Ritchie, Ch. J., and Gwynne, J., dissenting. Commenting on the phraseology of the statute Patterson, J., said: "We find the two expressions [i.e., employés and servants] used convertibly; as, e.g., in section 112 'any officer or servant

of, or any person employed by the department;' and in section 121 'any officer or servant of, or person in the employ of the department,' obviously denoting the same persons described in sections 64, 74, 82, 106, and 109, as 'officer, servant or employé' of the department. The word as used in the statute means, in my opinion, 'servant' and nothing more. It is, perhaps, inserted to save the feelings of those servants who do not like to be called servants, or by way of concession to the tendency of the day to understand the word servant as expressive only of a lower or quasi-menial grade. . . . Thus the statute is its own interpreter. The 'employé or servant of the department' is not a contractor like these defendants who agree with Her Majesty to provide materials and labour, and to execute such works as the construction of a branch railway. Section 120 illustrates this. It provides for the 'punishment of every person wilfully obstructing any officer or employé in the execution of his duty,' obviously including under the term 'employé,' persons who might be called servants without fear of resentment on their part—switchmen for example—and proving that words 'employé or servant' are used to denote one class and not two classes of retainers."

A contractor is not within the purview of Maine Rev. Stat. 1857, chap. 51, § 25, which declares a railway company to be "liable for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its road, committed by a person in its employ." *Eaton v. European & N.A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430. The court laid stress upon the fact that "contractors" were expressly mentioned in § 25 of the statute, and that the legislature had thus recognized the difference between them and servants. But the decision is also, as it would seem, put upon general grounds.

One who contracts to do the grading of a section of railroad, the entire work to be done by servants and labourers employed by himself, but subject to the approval of the company's chief engineer, and under the direction of its assistant engineer, is an independent contractor, and not an authorized agent or employé of the company, within S. C. Gen. Stat. § 1511, making railroad companies liable in damages for a fire originating within the limits of its right of way, in consequence of the negligence of its authorized agents or employés. *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

A contractor is not a "servant or overseer" within the meaning of La. Civil Code, 2299. *Peyton v. Richards* (1856) 11 La. Ann. 62; *Gallagher v. Southwestern Exposition Asso.* (1876) 28 La. Ann. 943.

A person operating a shingle machine to manufacture shingles by the thousand for the owners or lessees of a mill is a contractor, and not a person in their "employ," in such a sense that they are chargeable with liability for his acts under the Maine statute (Sp. Stat. 1868, chap. 448) "passed to prevent throwing slabs and other refuse into Penobscot River." *State v. Emerson* (1881) 72 Me. 455.

Fisherman who under an agreement to fish from their homes, in their own boats, for lobsters during the fishing season, are independent contractors, and not servants. Accordingly they are not within the purview of the Masters and Servants Act of Newfoundland (Consol. Stat. chap. 109), and cannot be prosecuted for the abandonment of their contract, where they have taken up their traps in the middle of the season and refused to proceed with the fishery. *Ex parte Costigan* (1889) Newfoundland Rep. (1884-1896) 414. Referring to the phraseology of the statute, the court said: "Such words as, 'his master consents to receive him back into his service,' 'absent himself from his employer's service without leave'—the forfeiture, for absence, of a 'sum equal to twice the ratable proportion of his wages'—the penalties to which third parties are made liable 'who shall harbour or employ the servant of another after notice,'—and so forth, attesting conclusively to the inapplicability of the statute to such a case as the present."

A person hiring himself to work with his own team of oxen is not within the English statutes which punish laborers who desert their service. *Whelen v. Stevens* (1827) 2 Taylor (Ont.) 439.

Under Mansfield Digest, (Ark.) § 1958, providing that if any hireling shall wilfully set on fire any woods, etc., so as to occasion damage to any other person, with the consent or by the command of his employer, the latter shall be liable, the word "hireling" does not refer to independent contractors, but to servants of railroad companies. *St. Louis I. M. & S. R. Co. v. Yonley* (1890) 53 Ark. 503, 9 L. R. A. 604, 13 S. W. 333, 14 S. W. 800.

prehensive to embrace contractors has been ascribed to the word "servant," as used in two English Acts defining the responsibility of common carriers (*b*).

9.—Character of contract is tested by the existence or absence of a right of control on the employer's part.—From what has been said in § 6, ante, it is apparent that, except in cases which involve the liabilities arising out of the torts of certain classes of agents, the existence or absence of a right to exercise control over the details of the work in question must be the appropriate and decisive test by which it is to be determined whether the person employed to

Compare also the cases cited in § 26, post.

That an independent contractor cannot be convicted under the embezzlement statutes has been held in several cases.

A finding that the prisoner was employed in the capacity of "clerk or servant" within the meaning of the statute, 24 & 25 Vict. is not warranted by evidence that the prisoner carried on an independent business, as an accountant and debt collector, that he was employed by the prosecutors to collect certain debts specified in a list given to him and was to pay over to the prosecutors the amounts received, as soon as he should have collected them; that the time and mode of collecting the debts was in his discretion, and he was authorized to sue for them, if necessary, but at his own charge; and that in no case was he to receive from the prosecutors more than five per cent. on the amount collected by him and paid over to the prosecutors. *Reg. v. Hall* (1875) 13 Cox C.C. 49, 31 L.T.N.S. 883.

A bare authority to get orders and collect moneys on commission does not constitute a "clerk" or "servant" within the meaning of the New Zealand Larceny Act, 1867. *Reg. v. Clifford*, 3 New Zealand J.R.N.S.C. 51.

See also the cases as to drovers cited in § 12, note (b), subd. 15 post.

(*b*) By the 8th section of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, chap. 68, it is provided that nothing in the act shall protect from liability from loss or injury arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ. Every person is a "servant" within the meaning of this proviso who is directly or indirectly employed by the carrier to do what he has contracted to do. Accordingly a carrier has been held responsible for the theft of an article by a man in the employ of a firm with which a sub-contract had been made for the delivery of such goods as the defendant might convey to the city in question. *Machu v. London & S.W. R. Co.* (1848) 2 Exch. 415, 5 Eng. Ry. & C. Cas. 302, 17 L.J. Exch. N.S. 271, 12 Jur. 501.

This decision was followed in a later one by which a railway company was held liable for the value of goods which had been obtained through a forged order, while they were lying at one of the company's stations, and misappropriated by a man in the employ of the proprietor of the receiving office at which they had previously been delivered by the plaintiff for transmission to the station. *Stephens v. London & S.W.R. Co.* (1886) 18 Q.B.D. 121.

A similar conclusion has been arrived at with regard to the meaning of the word "servants" in the Railway and Canal Traffic Act, 1854, s. 7, which enacts that every company within its purview shall be liable for the loss of, or for any injury done to, any house, cattle, etc., occasioned by the neglect or default of such company or its "servants," notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto. In *Doolan v. Midland R. Co.* (1877) L.R. 2 App. Cas. 792, 37 L.T.N.S. 317, 25 Weekl. Rep. 882, 3 Asp. Mar. L. Cas. 685, a railway company was held liable under this provision for the negligence of the master and crew of a steamer, with the owners of which the company had contracted for the conveyance of certain cattle.

do that work is or is not an independent contractor (a). The qualified expressions occasionally used in the reports might seem to indicate that this test was not considered by some judges to be absolutely paramount (b). But it is more than probable that this guarded language is to be ascribed merely to an excess of judicial caution. At all events the weight of authority, as well as the logical inferences to be drawn from the definition of servant, as given in § 6, are decisively in favour of the doctrine, that this test is so entirely conclusive that it prevails against and overrides the

(a) In one case the court expressed its disapproval of a doctrine stated to have been put forward by some of the authorities, viz., that "the existence of actual present control and supervision on the part of the employer is the test" to be applied for the purpose of ascertaining whether this relation to the employee is that of a master. Such a circumstance, it was declared, "is only a circumstance to be considered, although one of much weight." The court then proceeds to state in the following words what it regarded as the correct theory; "To get at the truth we must look further, and see if the person said to be a hired servant and agent is acting at the time for, and in the place of, his master, in accordance with and representing his master's will and not his own. It must be strictly his employer's business that he is doing, and not in any respect his own. If we find this to be the case we may safely conclude, as a general rule, that the relation of master and servant exists, so as to render applicable the rule of law that the employer must indemnify and protect the agent he employs." *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63. The doctrinal position of the court is not very clearly indicated. If it is intended to deny the crucial character of the test supplied by the existence or absence of control, the case is manifestly opposed to the general current of the authorities. The latter part of the quotation seems to suggest that an employé must always be pronounced to be a servant, if it is found that he represented the will of his employers. But, according to the generally received view, this inference should be drawn only when the employer's will is represented as to the means used in performing the stipulated work. See note (d), *infra*.

(b) "Independence of control in employing workman and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not." *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91.

"The question in these cases, whether the relation be that of master and servant or not, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor." *Forsyth v. Hooper* (1865) 11 Allen, 419.

Whether the relation be that of master and servant so as to invoke the rule of respondeat superior, depends "mainly on whether the employer retains direction and control of the work, or has given it to the contractor." *Andrews v. Boedecker* (1885) 17 Ill. App. 213.

In one case it is laid down that "the question of control over the work, while not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance." *State, Redstrake v. Prosecutor Swayse* (1889) 52 N.J.L. 129, 18 Atl. 697.

"Who is an independent contractor? Or, rather, is he an independent contractor, or only an agent or representative of the employer in the particular case? A test which has been proposed, and generally an adequate one, or as good a test put in a few words as can be suggested, is:—Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, the employer is liable; if not, he is not liable, for the reason that the one doing the act is an independent contractor." *Carrico v. West Virginia C. & P.R. Co.* (1894) 39 W.Va. 86, 24 L.R.A. 50, 19 S.E. 571.

effect of any antagonistic evidence which may be introduced. This doctrine is not only asserted in numerous direct statements made by various judges, (c) but also supplies the essence of all the manifold forms of statement, by which judges and text writers have undertaken to define more or less formally the meaning of the term independent contractor (d).

(c) See, for example, the following: "The test is, whether the defendant retained the power of controlling the work." Crompton, J., in *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 578, 24 L.J.Q.B.N.S. 138, 1 Jur. N.S. 677, 3 Week. Rep. 181, 3 C.L.R. 760.

"The test, I think, always is, had the superior personal control or power over the acting or mode of acting of the subordinate?" Per Lord Gifford in *Stevens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535; statement referred to with approval in *Atlantic Transp. Co. v. Coneys* (1897) 28 C.C.A. 388, 51 U.S. App. 570, 82 Fed. 177.

"The right to control the negligent servant is the test by which it is determined whether the relation of master and servant exists." *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176, Ill. 100, 52 N.E. 17.

"In every case the decisive question is, Had the defendant right to control in the given particular the conduct of the person doing the wrong?" Thompson, Neg. p. 909; statement adopted in *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691.

The test of the character of an employé as an independent contractor or as servant is, "whether Smith was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." *Morgan v. Smith* (1893) 159 Mass. 570, 35 N.E. 101.

"The test by which to determine whether the person who negligently causes injury to another was acting as an agent or employé of the person sought to be charged, or as an independent contractor, is, Did the person so sought to be charged have the right to control the conduct of the wrongdoer in the manner of doing the act resulting in such injury?" *Gahagan v. Aermotor Co.* (1897) 67 Minn. 252, 69 N.W. 914; *Corigan v. Elsinger* (1900) 81 Minn. 42, 83 N.W. 492.

(d) *Language used by judges.*—"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as a result of his work." *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691, approved in *Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

"When the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach." *Linton v. Smith* (1857) 8 Gray 147.

One who, as an independent business, undertakes to do specific jobs of work, without submitting himself to control as to the petty details, is an independent contractor. *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N.W. 58.

In a leading New York case the contention of the defendant was stated to be "in substance, that when a person is engaged in doing a job or piece of work, under an employment or contract which leaves to him the independent use of his own skill, judgment, means and servants in the execution of it, he is not the agent or servant of the general employer." *Blake v. Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304.

"This rule [i.e., respondeat superior], does not apply, and the liability does not exist, where it can be shown that those engaged in executing the work, and by whose carelessness or want of skill the injury was occasioned, are not the servants or subordinates of him for whose use and benefit the work is being performed, but are acting under a contract or employment which leaves the

contractor or employé free to exercise his own judgment as to the means and assistants to be employed in accomplishing the work, without being subject to control in these respects by the party for whom the work is being done." *McCamus v. Citizens' Gaslight Co.* (1863) 40 Barb. 380.

In a Maryland case a court, referring to certain decisions said: "It results from them that the rule of respondeat superior does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor, pursuing an independent employment, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of control and direction, in this respect, of the party for whom the work is being done." *Deford v. State* (1868) 30 M.D. 179.

The following passage is extracted from a charge to the jury: "If you find from the proof that the defendant let the whole work of excavating and finishing the vault to Tamlyn, as a contractor, to finish and complete the whole as a job, without reserving any control or direction over him in its construction, or over the construction of the work, or the place where it was being constructed, or the mode of its execution, or the workmen to be employed to do it, then he would be an independent contractor, and the defendant is not liable for his negligence in not providing suitable guards against danger to persons passing on the sidewalk." *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

"To incur the responsibility [on the ground of the relation merely] the master must not only have the power to select the servant or agent, but to direct the mode of executing the work, and to so control him in his acts in the course of the employment as to prevent injury to others." *Robinson v. Webb* (1875) 11 Bush, 464.

If the employer "merely prescribes the end and contracts with another to accomplish the end by such means or methods as such other may in his discretion employ, the latter is as to such means and methods not a servant, but a master; and for negligence therein is alone answerable." *Bailey v. Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"If, in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter has no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable." *Wabash, St. L. & P.R. Co. v. Farver* (1887) 111 Ind. 195, 6 Am. Rep. 696, 12 N.E. 296.

"In general, the master is liable in law for the negligence of the servant, through whom, in legal contemplation, he is said to act, while in his employment. When, however, the person employed is engaged under an entire contract, for a gross sum, and in an independent operation, not subject to the discretion or control of his employer, the relation is not regarded as that of master and servant, but is said in modern phrase to be that of contractor and contractee; and the negligence of such contracting party, or of his servant, cannot be charged upon him for whom the work is contracted to be done." *Forsyth v. Hooper* (1865) 11 Allen, 419; statement adopted in *McCarrier v. Hollister* (1902) 15 S.D. 366, 91 Am. St. Rep. 695, 89 N.W. 862.

"The test is: Which party controls the work while it is progressing? Who has charge of the management and control of the forces, and who controls the movement and location of the material used in the construction? Who hires the workmen, buys the material, arranges the details, directs and superintends the labour, and is responsible for all failures which do not meet the requirements of the contract, or fulfill the specification? Who alone is responsible for results produced by separate and independent management? Who has control of the mode and manner of doing the work, subject only to a provision that it must be equal to a fixed rule, or a certain degree of excellence? When that is determined, liability is fixed." *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728.

"Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an 'independent contractor,' and in such case the contractor, alone, and not the employer, is liable for damages caused by the contractor's negligence

in the execution of the work." *Smith v. Simmons* (1843) 103 Pa. 32, 49 Am. Rep. 113.

The rule is "that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer the latter is not responsible for the negligence or misdoings of the former." *De Forest v. Wright* (1852) 2 Mich. 368; adopted in *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

"If one renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished, it is an independent employment." *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

An independent contractor has also been described as a person who contracts to do a given piece of work "according to his own methods, and without being subject to the control of his employer, except as to the result of his work" (*Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776); and as one who is "answerable to his employer, only as to the results of the work, and not in the details of its management, or the incidents of its prosecution" (*St. Louis F.R. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728); and as one who is "left to produce the desired result in his own way" (*Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329); and as one who "carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance" (*Smith v. Simmons* (1883) 103 Pa. 32; 49 Am. Rep. 113; *Smith v. Belshaw* (1891) 89 Cal. 427, 26 Pac. 834). Similar phraseology embodying the same antithesis as is indicated by this form of statement is also found in many other cases. See, for example, *Casement v. Brown* (1892) 148 U.S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; *Tennessee Coal, Iron & R. Co. v. Hayes* (1892) 97 Ala. 201, 12 So. 98; *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272; *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663; *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Wood v. Watertown* (1890) 58 Hun, 298, 11 N.Y. Supp. 864; *Edmundston v. Pittsburgh M. & Y.R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; and *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. As to the meaning of the word "result" in this form of statement, see the extract from the opinion in *Jensen v. Barbour* (1895) 15 Mont. 582, 39 Pac. 906, S. 379 note (c), post.

In one case it was laid down that "a contractor is not the agent or servant of his employer, except as to the specific results which he undertakes to accomplish." *Holt v. Whalley* (1874) 51 Ala. 569. But this mode of stating the nature of the relation is hardly to be commended.

"While performing his contract and complying with its terms he [i.e. an independent contractor] is not subject to the rule and control of the employer, who cannot interfere save to require the performance as agreed. The relation is one of contract under which the contractor retains some degree of independence, while the labouring man follows the employer's direction, and is not independent in the sense of the independent contractor's independence." *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403.

It is error to give an instruction from which the jury may infer that the mere employment and payment of another to perform a given piece of work is the test by which to determine whether the relation of master and servant exists. *Andrews v. Boedecker* (1885) 17 Ill. App. 213, where the jury were charged that it was legal and proper for the defendant to employ and pay the negligent person to do the work in question, and that in such case that person would be the servant of the defendant in doing that work.

In one case it was laid down that certain requested instructions to the effect that, if the defendants employed an experienced carpenter to erect the building in question they were not liable, were defective, in not requiring the jury to find that the building was being erected by an independent contract which gave the carpenter exclusive control over the work. *Hearn v. Quillen* (1901) 94 Md. 39, 50 Atl. 402.

In a case where the question was, whether the owners of a steamboat were liable for the negligence of the persons operating it, the trial judge was held to have erred in sustaining objections to the introduction of evidence tending to show a transfer of control by such owner. *Gulsoni v. Tyler* (1883) 64 Cal. 334, 30 Pac. 381.

Language used by text-writers.—The following definitions by legal authors have received the approval of various American courts:

"Where the contract is for something that may lawfully be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, and the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the person employed by the contractor so as to be responsible to third persons for their negligence." Cooley, Torts, p. 646; quoted in *Boardman v. Crighton* (1901) 95 Me. 154, 49 Atl. 663.

"An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 2 Thompson, Neg. 1st ed. § 22, p. 899; and ed. § 622; adopted in *Crenshaw v. Ullman* (1892) 113 Mo. 633, 20 S.W. 1077; *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

"One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant." Shearm & Redf. Neg. § 165; adopted in *Foster v. Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N.E. 163; *Hale v. Johnson* (1875) 80 Ill. 185; *Barg v. Bousfield* (1896) 65 Minn. 355, 68 N.W. 45; *Pichens v. Diecher* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632.

The true test by which to determine whether one who renders services to another does so as a contractor, or not, is to ascertain whether he "renders the services in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as the means by which it is accomplished." Shearm & Redf. Neg. § 164; adopted in *Rome & D.R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94.

When a person lets out work to another to be done by him, such person to furnish the labor and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." Wood on Mast. and S. p. 593; adopted in *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

If the principal using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent, when the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." Mechem, Agency, § 747, quoted with approval in *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S.E. 163.

"An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work." Elliott, Railroads, § 1063; adopted in *Norfolk & W. R. Co. v. Stevens* (1899) 97 Va. 631, 46 L.R.A. 367, 34 S.E. 525.

"Where a person contracts with another, exercising an independent calling, to do work for him according to the contractor's own methods, and not subject to his control or orders except as to results to be obtained, the former is not liable for the wrongful acts of the contractor or his servants." 14 Am. & Eng. Enc. Law, p. 830; adopted in *Long v. Moon* (1891) 107 Mo. 334, 17 S.W. 810.

10. **Same subject continued.**—An analysis of the elements embraced in the statements quoted above indicates that the juridical conception of an independent contractor is simply that of a person who, being in the exercise of a distinct and recognized trade, craft, or business, undertakes to do certain work, without submitting himself to the control of the employer, in respect to the details of that work. Considered from one point of view, the situation contemplated when such a person is engaged implies that the employer has nothing to do in respect to the work, except to see that it is done according to the terms of the contract (*a*); or that he has merely a right to see that the contract is performed in pursuance of its terms, conditions, and specifications (*b*). Considered from another point of view, that situation implies that he is to have the independent use of his own skill, judgment, means, and servants in the execution of the work (*c*); or that he is to have the exclusive direction and control of the manner in which the work is to be done (*d*); or that he is to have full control of the work and workmen (*e*); or that the execution of the work is to be left entirely to his discretion (*f*); or that he is to be free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work (*g*); or that he is to be left entirely free to do the work as he pleased (*h*); or that the work is to be done according to his own methods (*i*); or that he is to procure labour and materials in his own way, provided they are such as the contract demands, and use such machinery and appliances as he deems proper, provided they do not unnecessarily injure the subject-matter of the contract, or interfere with work done by others (*j*).

(*a*) *Martin v. Tribune Asso.* (1883) 30 Hun. 391.

(*b*) *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

(*c*) *Blake v. Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304.

(*d*) *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63.

(*e*) *Allen v. Willard* (1868) 57 Pa. 374.

(*f*) *Hexamer v. Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

(*g*) *Deford v. State* (1868) 30 Md. 179.

(*h*) *McCarthy v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

(*i*) *Wiese v. Remme* (1897) 140 Mo. 289, 41 S.W. 797.

(*j*) *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa 267, 60 N. W. 640.

Ordinarily, of course, the servants of the person employed are, for the purpose of applying the above-mentioned test, identified with him in considering the effect of the evidence. It may be observed, however, that there is a class of cases in which, although it may be apparent that the person employed was himself an independent contractor, there is still an ulterior question to be settled, viz., whether the men who were engaged in doing the work which was the immediate cause of the injury were, at the time when the injury was received, under his control or under the control of the employer. If the latter should be the situation established by the evidence, the employer is plainly liable, and the independence of the contract ceases to be a differentiating factor (*k*).

Where the employer's agent, acting under a power expressly reserved to "vary, extend, or diminish the quantity of work during its progress," orders the performance of additional work which is connected with the work covered by the contract, the inference is that, while the additional work is in progress, the relations between the parties and the obligations and responsibilities to which they are subject are identical with those which are deducible from the provisions of the contract (*l*).

11. **Presumptions entertained as to the character of the contract.**—The weight of authority is in favour of the doctrine that, when the inquiry is at that initial stage at which nothing more appears than that the actual tort-feasor was, at the time when the injury was inflicted, in the employment of the party whom it is sought to hold responsible for the injury, the latter, if he relies on that

(*k*) See a full collection of the authorities in a monograph contributed by the present writer to the *Lawyers' Reports Annotated*, Vol. 37, pp. 33, especially pp. 69, et seq.

In *Turner v. Great Eastern R. Co.* (1875) 33 L.T.N.S. 431, where the plaintiff was injured by the negligent management of moving railway cars, while he was working for a man who had contracted to discharge coal from cars standing on a siding, the discussion was centred wholly upon the question whether the defendant company exercised such a control over the plaintiff and his fellow workman as to make them its own servants *ad hanc vicem*. Grove, J., in his opinion remarked: "No doubt the cases do not necessarily depend on the term contractor, because the man may stand in different relations to the person with whom he contracts and those whom he employs."

(*l*) *Charlock v. Freel* (1891) 125 N.Y. 357, 26 N.E. 262. The court remarked that the additional work, as it came between the completion of the sewer and the repaving of the street, and was designed to make the drainage better, was cognate in its nature to the principal undertaking, and that the effect of its assumption was to continue the contract relations between the parties, with all the obligations and responsibilities which, either expressly or by legal implication, were imposed by that contract.

defense, has the burden of proving that the tort-feasor was an independent contractor (a).

On the other hand, though such a doctrine has apparently not been explicitly formulated, it would at least seem to be a reasonable inference from the decisions as a whole that no presumption that the relation of the parties was that of master and servant can be entertained, when the case has been developed to a point at which the nature of the employment, whether general, or with a view to a specific result, the character of the work contracted

(a) In *Welfare v. London, B. & S. C. R. Co.* (1869) L.R. 4 Q.B. 693, 38 L.J.Q.B.N.S. 241, 20 L.S.N.S. 743, 17 Weekl. Rep. 1065, Cockburn, Ch. J., in the course of some remarks which were concurred in by Blackburn, J., said: "I agree that, where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done."

In a New York case it has been laid down that prima facie the person at whose instance and for whose use and benefit work is done is liable for all injuries to third parties resulting from the negligence or unskillfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, "it is no more proper to assume that . . . it gave the contractor an independent employment, than that it stipulated for the work to be done under the immediate supervision and direction of the defendants;" and that, if the defense relied upon is that the relation between the parties was not that of master and servant, "it is always necessary to show the terms of the contract with sufficient particularity to enable the court to determine whether the employment was of this independent character." *McCamus v. Citizens' Gaslight Co.* (1863) 40 Barb. 380.

Where it is a question of the effect of a complaint, the relation of master and servant will, as a general rule, be inferred from any allegations which merely show that the persons for whose negligence it is sought to hold the defendant responsible were doing the work in question upon his property, while he had possession and control thereof, that the work was being done with his consent for his benefit, and that it was executed in an unskillful manner. *Dillon v. Hunt* (1884) 82 Mo. 150, Aff'g (1881) 11 Mo. App. 246, where however the decision was put upon the ground of the non-delegable quality of the duty of a land owner so to use his property as not to create a nuisance. The reasoning of the Court of Appeals is mentioned with approval in (1891) 105 Mo. 154, 24 Am. St. Rep. 374, 16 S.W. 516, where a new trial was ordered for the reason that there had been error in the admission of evidence.

The doctrine stated in the text is also recognized in *State v. Swayse* (1889) 52 N.J.S. 129, 18 Atl. 697 (see § 23, note (a), post); *Perry v. Ford* (1885) 17 Mo. App. 212 (see same section).

These authorities outweigh the effect of the remarks of the court in *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103, to the effect that, as the burden is on the plaintiff to prove that the relation of master and servant existed, no presumptions which do not arise from the evidence can be indulged in his favor.

In an earlier case, *Rome & D. R. Co. v. Chastain* (1889) 88 Ala. 591, 7 So. 94, where an accident was caused by the negligent manner in which the servants of a person engaged in constructing a railway had operated a train, it was the opinion of a portion of the same court that as it was in the power of the defendant to produce and prove a contract, and it had not done so, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, showed prima facie that those employed in the work of construction were the servants of the company, and cast upon it the burden to prove that the person employed had possession of and controlled the road, engine and cars, as a contractor, and not as a servant.

for, and the industrial status of the person engaged, have been disclosed by the testimony (b). In fact there is express authority for the rule that, in some states of the evidence, the contrary presumption will prevail and enure to the advantage of the defendant (c).

(b) That this statement is fully as favourable as the authorities warrant to the party who relies on the theory that, under the given circumstances, the relation was that of master and servant, is abundantly manifest from the cases cited in the ensuing sections.

An instruction is erroneous which would authorize the jury to assume that a man employed to take charge of a stable and train his employer's horses was necessarily a servant. *Arasmith v. Temple* (1882) 11 Ill. App. 39 (trainer assaulted a man hired by him). Discussing the question how it is to be ascertained in such cases as the one under review that the employer has not the right of control, the court said: "The contract in terms makes no provision in relation to it. Of necessity, therefore, resort must be had to circumstantial evidence; the parties, the work, and such other facts shown as would naturally lead us, in the light of our general knowledge of men and business, to inter their intention. For example, if the contract disclosed nothing more of what was to be done than that it was to work on a farm, the natural inference from the simple circumstance that nothing more was specified, in the light of common knowledge of the variety of work to be done on a farm, would be that the employé was to be directed from time to time what to do and how to do it. So, if it were to work at plowing, or ditching, or fencing on a certain farm; for there would still be nothing definite in respect to the time, place, amount or style of the work, and as to these the party for whom it was to be done would naturally be expected to direct. If, however, it were to plow a certain field for the next corn planting, to build a certain described fence, to dig and complete a well, as specified, or the like, it would present the case of a contract for a 'specific job,' where the employer might be interested only in the 'result' and quite indifferent to the mode of its accomplishment. Here it might be difficult to form a satisfactory conclusion upon the point in question from this circumstance alone. But the further fact that the job was such as to require for its accomplishment some special knowledge and skill, falling within 'a regular independent employment' or 'distinct calling' which the employé followed as a business, would raise some probability that it was intended to leave to his judgment, to be exercised on his own responsibility, the means, the manner of using them, and all the details of the work. This probability would be increased by the additional fact that he was to be paid for it a 'gross sum;' and still further, 'if he used his own tools and assistants;' and still further, if the employer neither had nor pretended to have the special knowledge or skill required; and might become a clear belief, if it also appeared that during the progress of the work he did not in fact, though present, give any directions in regard to them. These and other like circumstances appearing in different cases have come to be recognized as indicia of the character of a contractor, and have been gathered up by courts and text writers into definitions to distinguish it from that of a servant. No one, perhaps, is essential to it or conclusive of it, but they all tend to establish the one fact which is decisive, namely, that as to the act in question the employee was not subject to the control and direction of the employer."

In a Michigan case the nature of the employment, and the occupation of the person employed are mentioned, arguendo, among the factors which determine the nature of the relation between the parties to any given contract. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

(c) In *Welfare v. London, B. & S.C.R. Co.* (1869) L.R. 4 Q. B. 693, 38 L.J.Q.B. N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065, where a person was injured by a plank which was let fall by a workman engaged in repairing the roof of a railway station, Cockburn, Ch. J., remarked that, if it were necessary to determine

12.—Independence of contract usually inferable where it is for the performance of an entire piece of work at a specified price.—The adoption of the conception of an independent contractor, as it has been explained in §§ 6, 9, ante, may be said to entail, as a necessary consequence, the acceptance of the doctrine that, where the substantial effect of the evidence is that the person employed was engaged in some occupation which might in a reasonable sense be described as distinct, and that he undertook to execute a particular piece of work for a specified price, calculated with reference to the quantity of work actually performed, it is, as a general rule, an inference in point of law, that the employer did not intend to exercise any control over the work while it was in progress, but merely reserved the right to reject the results produced thereby (a). The

the question, whether the workman was the servant of a contractor, the court would have to consider whether the case was properly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that the workman was a servant of the company, and after adverting to the general principle already stated in the text, proceeded thus: "But in the case of work of this description, it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings: they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance where the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In order to charge an undertaker with liability for the negligence of the driver of a carriage at a funeral it is not enough to show that the latter was engaged by the former to furnish and drive the carriage. It is also necessary that some specific evidence should be given which tends to show that the employer had the right to control the driver. *Boniface v. Relyea* (1868) 6 Robt. 397.

Evidence that a city had a contract with the person who piled lumber on a street for the purchase of the lumber is sufficient to authorize a charge on the law respecting the liability of an owner to third persons from the negligence of an independent contractor, although the terms of the contract do not appear, since, if there is anything in the terms of the contract tending to show the relation of master and servant between the city and such person, the party asserting that such was their relation should offer evidence to prove it. *Evansville v. Senheim* (1898) 151 Ind. 61, 41 L.R.A. 734, 51 N.E. 88. Denying Rehearing in 47 N.E. 634, 41 L.R.A. 728, 151 Ind. 42.

(a) When a person "enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labour and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents" of the contractee, but are independent contractors. *Uppington v. New York* (1901) 165 N.Y. 223, 53 L.R.A. 550, 59 N.E. 91.

Under § 1799 of the French Civ. Code (which is in force in Quebec and Mauritius), masons, carpenters, locksmiths, and other workmen, who make contracts by the job on their own account are deemed to be contractors for the kind of work they undertake, and subject to the rules prescribed with regard to that class of employés.

decisions which illustrate this doctrine are collected under convenient headings in the subjoined note (b).

(b) (1) *Persons engaged in construction or other work on railways.*—In *Steel v. South-Eastern R. Co.* (1855) 16 C.B. 550, there was evidence to shew that the work was being done under the superintendence of one P., the defendants' surveyor, who furnished the plans; but one E., the foreman of one F., a bricklayer, stated that the work was done by him and the men employed by him, under a contract between F. and the company. Upon his cross-examination, the witness said that he had orders, from P. to go on, that P. was the person who told him what to do, but that he was the responsible person to determine in what manner that which P. directed him to do should be carried out. It further appeared, that P. had directed the witness to do the work in a certain manner, and that the injury resulted from the workmen having disobeyed this direction. It was held that the trial judge had properly directed a non-suit on the ground that F. was an independent contractor.

Provisions in a contract, which shew that a construction company was to survey and locate a line, procure the right-of-way, build the roadbed, tracks, bridges, side tracks, etc., and equip the same with engines and cars in accordance with certain specifications, implies a condition of things which necessarily makes the construction company an independent contractor, so far as the provisions of the contract furnish a rule for classification. *St. Louis Ft. S. & W.R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728.

A person who contracts to build the roadbed of a railway ready for the superstructure according to the terms of the agreement, and to deliver it over on a certain date, and who, in doing the work, employs his own hands and teams, and furnishes his own material, implements and tools is prima facie an independent contractor. *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449.

The inference that a railway company intended to reserve the right of controlling the construction trains of a contractor who agreed to lay its track at the rate of a certain number of miles per month, cannot be drawn from a provision that the company is "to furnish all motive power and cars, and operate the construction trains." *Miller v. Minnesota & N.W.R. Co.* (1888) 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N.W. 188. The court observed that the word "operate" was, as the general tenor of the contract shewed, not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it, but in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors.

A person employed by a railway company to pump water out of an excavation by means of a portable steam engine is an independent contractor, where neither the company, nor any of its employees has the right to operate the engine or to interfere in the manner of its operation, or to direct the owner how or when it shall be operated; and the only right the company has in respect to the matter is to require the owner of the engine to accomplish the end of keeping the water down to a certain level. *Wabash, St. L. & P.R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

A man who undertakes for a lump sum to repair a wharf belonging to a railway company, and is not controlled or interfered with by his employer while the work is in progress, is an independent contractor. *Brunswick Grocery Co. v. Brunswick & W.R. Co.* (1898) 106 Ga. 270, 32 S.E. 92, 71 Am. St. Rep. 249.

So also is a man who undertakes to supply at a stipulated price per cord the wood which a railway company requires for fuel. *Leavitt v. Bangor & A.R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998.

See also the cases cited in §§ 15, 17, post.

(2) *Persons who undertake the construction of entire buildings or specific portions thereof.*—A person with whom a contract is made for the erection of an entire building, and to whom the premises are surrendered for that purpose, is an independent contractor. *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The Court said: "Were those contractors the servants of the owners? That they are not seems to us apparent. They were not bound to perform the labour under the direction of the owners, or their agents, but under their contract. It

was not to them that the contractor looked for directions, but to the agreement. They were bound to furnish the materials and labour, and complete the building within a given time, and the owners had no right to control the selection of the materials or direct when the work should be performed, but only to look to their contract for its performance in pursuance to its terms, conditions and specifications."

One having an entire contract to erect a building according to the plans and specifications furnished to him by the owner, who has nothing to do with the work, or employment, or payment or hiring of hands, is an independent contractor. *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S.W. 1077; *Wiese v. Remme* (1897) 140 Mo. 289, 41 D.M. 797.

One who contracts to build a house, and undertakes to furnish the materials, make the excavation, build the walls of the foundation, put up the building, and complete the work, replacing the plank removed from the sidewalk, etc., within a specified time, and in a specified manner, and for a stipulated compensation, is an independent contractor. *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590.

Where a superintendent chosen by a school district to superintend certain improvements in a school-house is only authorized to direct the person employed in respect to the manner in which the work is to be executed, the latter is an independent contractor. *School District v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627.

The plaintiff and defendant being owners of adjoining lots, the latter built a wall upon his lot, along the boundary line between them; the same being constructed for him by D. and C. under a written contract at a specified price calculated with reference to the quantity of work done. The defendant furnished the materials only, but employed no workmen and exercised no control over them. Held, that the relation of master and servant, or principal and agent, did not exist between the defendant and those by whom the wall was constructed. *Benedict v. Martin* (1862) 36 Barb. 288 (error to exclude from the consideration of the jury the question whether the action was not barred on this ground).

One engaged in the construction of a building who employs and pays the laborers himself, without being under the control of the owner of the building, is an independent contractor, though he is to be paid a percentage on the cost of erection. *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N.E. 242.

A contract couched on the following terms was held to indicate on its face that the employer did not, in any respect, retain control of the work as to the method, time or place of its execution, but only as the result accomplished: "We will pay \$3.60 per ton for the erection of the structural iron work, not including stairs, on our order No. 131 for Gluck Brewing Company, you to erect the same in a satisfactory manner, according to plans, to bolt all lintels together as required, and paint all material one coat when not already painted. It is understood that you are not to take the material from the place where it is now piled. You are to make out your pay rolls, and we will pay the same on regular pay days at the office. If you want to discharge a man, we will pay him on presentation of regular discharge slip by you: It is understood that we are to furnish all tools and paints." *Klages v. Gillette-Hersog Mfg. Co.* (1902) 86 Minn. 458, 70 N.W. 1116. But from a consideration of all the evidence surrounding the making of the contract the court was of the opinion that it did not conclusively appear that the true relations of the parties were defined by the writing.

The employment is independent, where a landowner agrees with one person for the entire granite material needed for a building, and with another person for the rest of the material and for work necessary to complete the building and structures required, and had nothing to do in respect to the work, except to see that it was done according to the terms of the contract. *Martin v. Tribune Asso.* (1883) 30 Hun, 391.

A corporation, owning a lot, entered into a contract for the erection of a building thereon, by the terms of which one Downey agreed to "take entire charge of all the work, ...to make all contracts for the various departments of work required, ...to see that the contracts entered into are honestly and faithfully kept," to be "responsible for all loss or damage from accidents during the construction of the building," and to take all proper precautions for the avoidance of such accidents. Through Downey the corporation thereafter made a

contract, containing similar covenants of indemnity, with sub-contractors named Weber for the mason work and scaffolding, and with a large number of other contractors for all the other work upon the building. Discussing the contention that an injury caused by the negligence of one of the workmen was imputable to the tract society, because it was the owner of the premises, the court said: "The evidence shows that it had made contracts with other parties for the entire construction of the building. Downey, by the terms of his contract, was not the agent of the society in the construction of the building, but an independent contractor within the meaning of the authorities, and the society had no control over the details of the work, or over the workmen employed in the building, the erection of which it had surrendered to Downey and the other contractors." *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

D., being the owner of a city lot, employed R. to draw plans and superintend the erection of a building thereon; R. drew a plan, to which D. assented; he paid R. a commission on the value of the building, R. having no interest other than to have the work done well, D. paid for the materials and the bills for all the workmen upon orders from R. R. employed T., a master bricklayer, and two carpenters; T. employed the journeymen bricklayers and hod carriers. Held, That R. and T. occupied the position of independent contractors. *Deford v. State* (1868) 30 Md. 179.

A wife authorized her husband to have a house erected for her on her separate property. The husband let the contract for brickwork to a contractor, for a stated consideration; "said work to be done in a workmanlike manner." He assumed no control over the employés of the contractor or the method of construction. He paid the contractor, and not his employés. Held, that the husband and wife were not liable for injuries received by a boy employed by the contractor to work on the house. *Simonton v. Perry* (1901); Tex. Civ. App. 62 S. W. 1090.

A person who contracts to put up and deliver to the owner of a building an elevator, fully completed and in working order, for a specified sum and according to written specifications, is an independent contractor. *Long v. Moon* (1891) 107 Mo. 334, 17 S.W. 810.

A contract under which the contractor exercised exclusive control and direction over the digging of the cellar of a house, the erection of the walls around it, together with the passageways into the same, and over the erection of the entire building, creates an independent employment. *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123.

The evidence showed that a firm doing business under the name of H. & M. were contractors engaged in jobs of the same kind as that which they were doing when the accident occurred, that they had undertaken to excavate for the foundations of a building for one R.; that they were to be paid a percentage upon the cost of the labour; that they employed and paid all labours themselves; that they alone exercised supervision of the work; that plaintiff was employed by them as a day labourer about the work at the time he received the injury complained of. It did not appear that, after the making of his agreement with M. & H., R. had any connection whatever with the excavation which was being done, further than to pay them the stipulated price when the work was finished. Held, that R was not liable for the negligence of M. & H. *Hale v. Johnson* (1875) 80 Ill. 185.

Plaintiff and defendant occupied buildings which were separated by a passageway about six feet wide, the dividing line of the properties being in the centre of the way. Water ran through the wall of defendant's building into the cellar, and it employed a man to repair the wall. The one so employed sent his workmen, who dug up the ground in the passageway, and left it so piled that, when a storm occurred, water was turned into plaintiff's cellar. In answer to the contention of the defendant, that Sawyer, the person employed, was a contractor, the auditor reported as follows: "I do not find that said Sawyer made any contract with the defendant, to stop the water from running into its cellar, but I find that said Sawyer did the work under a general employment, and was to receive a reasonable compensation therefor." The following sentence also formed part of the report: "It did not appear that the defendant gave any directions about the work done by Grenier, but left the method of doing the work and stopping the leak to his judgment." Commenting upon this report, the court

said : " The language of the auditor, when he says : ' I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar,' would seem to mean ' no contract in writing.' But this is not important. There was clearly a verbal contract either to stop the water from running into the cellar or to try to stop it,—and it is immaterial which—for which Sawyer was to have a reasonable compensation. In carrying out this contract, the plaintiff was injured by the negligence of the servants of Sawyer, who were hired by his representative Grenier. The defendant neither hired these servants nor was under any obligation to pay them. It exercised no control over them, nor, so far as appears, had any right to exercise such control. The method and manner of doing the work was left entirely to the skill and judgment of Sawyer, who on the facts found does not appear not to have been an independent contractor." *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405.

One under contract with the owner of premises to erect a wall thereon at a specified price per 1,000 brick is not a servant of a corporation, of which the owner is an officer, and which is in possession of the premises and also of the adjoining premises, so as to impose the duty of a master upon it in respect to protecting him from injury from its machinery. *Horton v. Vulcan Iron Works Co.* (1897) 13 A. Div. 508, 43 N.Y. Supp. 699.

One employed to do the woodwork on dry kilns under a contract providing that the owner shall furnish the materials, and that the contractor shall employ the labour and superintend the same and erect the buildings according to certain plans, and receive a per diem payment for himself and each of his employees, is an independent contractor. *Emmerson v. Fay* (1896) 94 Va. 60, 26 S.E. 386.

An artisan who makes a contract to trim the stone front of a building for a lump sum is an independent contractor. *Matthes v. Kerrigan* (1886) 21 Jones & S. 431 plaintiff who was injured by the fall of a scaffold which had been hung by a gang of painters, and which he used by defendant's permission, held not entitled to maintain an action on the theory that he was a servant of the defendant.

Where a carpenter engaged in building a house on his own lot contracts with a firm of brick masons to do all the brickwork, such firm employing the necessary labor, the brick masons are independent contractors. *Richmond v. Sitterding* (1903), 9 Va. L. Reg., 41, 43 S. E. 562.

A landowner is not liable for the negligence of a person who agrees to do all the necessary excavation and all the masons' and bricklayers' work required in the construction of a building on his property, and who, under the contract is to have the care of the building and whatsoever belonged thereto during the process and until completion. *Allen v. Willard* (1868) 57 Pa. 374.

A man who makes a special contract to put up the iron front of a building for a lump sum which he is to receive when the job is completed is an independent contractor. *Peyton v. Richards* (1856) 11 La. Ann. 62.

That a mason was an independent contractor has been held to be a proper inference, where the evidence is that the mason was employed in a single transaction at a specified price for the job ; that by the terms of the contract he was to accomplish a certain result, the choice of means and methods and details being left wholly to him ; that he was employed as a mechanic in a regular business, recognized as a distinct trade, requiring skill and experience ; that his duty was to conform himself to the terms of the contract ; and he was not subject to the immediate direction and control of his employers. *Lawrence v. Shipman* (1873) 39 Conn. 586.

Where a witness in answer to the question : " Was the building erected by the defendant company ; was it erected for them ?" said : " It was erected for them," it was held that the language, although equivocal, was such that a jury would be warranted in inferring that the persons constructing the building were independent contractors, and that a charge by which they were told that they were " not to presume in the absence of all evidence on the point, that the building was being erected under a contract," was erroneous. *Prairie State Loan & T. Co. v. Doig* (1873) 70 Ill. 52.

(3) *Persons engaged to execute repairs or improvements on a building.*—" As a general rule, where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which

if left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is specially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of a master, . . . and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another." *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Ann. Rep. 703, 4 N. E. 755.

The following employes have been held to be independent contractors:

A gas-fitter who takes a sub-contract under a person who has contracted to make certain alterations in a building. *Rapson v. Cubitt* (1842) 9 Mees & W. 710, Car. & M. 64, 6 Jur. 606, 11 L. J. Exch. N.S. 271.

A plumber employed to execute the entire job of repairing a cistern in a house. *Blake v. Woolf* (1898) 2 Q.B. 426.

A man who makes a contract with his employer to furnish all the material, and do all the work, and to complete certain specific alterations and improvements, to the satisfaction of the defendant, for a fixed and a certain sum to be paid to him. *Connors v. Hennessey* (1873) 112 Mass. 96.

A plumber, where he is left to exercise his own discretion. *Burns v. McDonald* (1894) 57 Mo. App. 599.

A plumber who has a right to send, and does send, a subordinate to do the stipulated work. *Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329.

One who contracts to do the plaster work for a person who has taken a contract to execute certain alterations in a building. *McLean v. Russell* (1850) 12 Sc. Sess. Cas., 2nd series, 887, 22 Sc. Jur. 394.

A scaffold builder employed by a painter to construct a scaffold for the use of his servants. *Devlin v. Smith* (1882) 89 N.Y. 470, 42 Am. Rep. 311.

See also *Welfare v. London B. & S.C.R. Co.* (1869) L.R. 4 Q.B. 696, cited in § 11, notes (a), (c), ante. 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065.

A mere contract to do certain work in repairing a house for a stipulated price, does not create the relation of master and servant so as to relieve the personal representative of the one for whom the work was done from liability for work performed after his death, even though the house is specifically devised and the personal representative has no interest therein. *Russell v. Buckhout* (1895) 87 Hun. 46, 68 N.Y., S.R. 150, 34 N.Y. Supp. 271. Dykman, J., dissented on the ground that the contract was dissolved by the death of the contractee, (*Lacy v. Getman*, 119 N.Y. 112) and that the administratrix was liable only for the amount due when that death occurred.

(4) *Architects*.—As building operations are ordinarily conducted, the architect acts as the agent and representative of the person for whom the work is being done. See, for example, *Campbell v. Lunsford* (1887) 83 Ala. 512, 3 So. 522; *Schwartz v. Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227; *Slater v. Mersereau* (1876) 64 N.Y. 138; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S.E. 1028; *School District v. Fuess* (1881) 98 Pa. 600, 42 Am. Rep. 627. But he is an independent contractor if he merely prepares the plans and specifications for the work, and does not afterwards supervise its execution on behalf of his employer. *Pitcher v. Lennon* (1896) 12 App. Div. 356, 42 N.Y. Supp. 156; *Burke v. Ireland* (1901) 166 N.Y. 305, 59 N.E. 914. In the judgment of the Supreme Court in the last cited case (see 1898 26 App. Div. 487, 50 N.Y. Supp. 369, (1900) 47 App. Div. 428, 62 N.Y. Supp. 453) the architect was assumed to be the agent of the owner; but it was held that he had exceeded his authority in modifying the plans and specifications without the assent of the owner. Still more is he to be considered to be an independent contractor where he undertakes to execute the entire work as well as to draw up the necessary plans. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

(5) *Persons doing work on bridges*.—That the negligence of a company employed to replace a broken shoe on a city bridge was not imputable to the city was held to be a necessary inference, where the only evidence of any action on the part of the defendant was, that one of its alderman, who was a member of its street committee, directed the company to have new and heavier shoes cast and placed under the bridge; and it was not shown that any directions were given

as to the manner in which the work was to be done, as to the persons who should be employed to do it, as to the means to be used in removing the old shoes and replacing them with the new ones, or as to the manner in which the bridge should be supported while this was done. *Wood v. Watertown* (1890) 58 Hun. 298, 11 N.Y. Supp. 864. This case was recently cited in *Scanlon v. Watertown* (1897) 14 App. Div. 1, 43 N.Y. Supp. 618, as being a correct application of the general rule.

(6) *Persons engaged in other kinds of construction work.*—The independence of the contract is inferable, where the person employed undertakes to perform the work of diverting a creek at a certain price, according to the employer's plans and to the satisfaction of his engineer; to provide machinery and materials, pay wages, give personal attendance, recompense landowners for injuries done by his neglect or mismanagement, and indemnify employes for actions in respect thereof. *Allen v. Haywood* (1845) 7 Q.B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L.J.Q.B.N.S. 99, 10 Jur. 92.

A person who agrees to construct a dam by such methods as he may think proper or expedient, is an independent contractor. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am Dec. 345.

One who contracts with a city to excavate a reservoir, and do the preliminary work, using his own men, teams and material, and adopting his own method of doing the work, without interference, or the right to interfere on the part of the city, is an independent contractor. *Groesbeck v. Pinson* (1899) 21 Tex. Civ. App. 44, 50 S.W. 620.

(7) *Persons undertaking various kinds of Work on Highways.*—A contractor who has undertaken to excavate the sewer for a city, and, though directed by the city officers to perform it, is doing it with workmen employed by himself, without interference from the city officers as to the manner or details of the work, is an independent contractor. *Charlock v. Freel* (1891) 125 N.Y. 357, 26 N.E. 262, affirming (1888) 50 Hun. 395, 3 N.Y. Supp. 226.

A., having obtained a license from the borough authorities to lay a water-pipe in the street, contracted with B., for \$25 [a specified sum], to dig a ditch in a borough street and lay the pipe, A. to furnish the pipe and boxing, but to have no further connection with the work. In an action against A. to recover damages for an injury caused by B's. negligence in leaving the ditch unprotected; it was held that B. was an independent contractor. *Smith v. Simmons* (1883) 103 Pa. 32, 49 A. Rep. 113.

A person who agrees to provide the materials and construct a sidewalk in front of the premises of an employer, who retains no power to direct the manner or means of doing the work, is an independent contractor. *Independence v. Slack* (1895) 134 Mo. 66, 34 S.W. 1094.

That the contract was an independent one was held in a case, where a firm engaged in work of that description, agreed to lay a granite pavement for the defendant. *Schweichhardt v. St. Louis* (1876) 2 Mo. App. 571.

A person who undertakes for a specific sum to repair a highway is an independent contractor. *Shute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

The plaintiff, a stonemason, contracted with the selectmen of a town to widen a certain highway in the town, by removing out of it a ledge of rocks, for which services they stipulated to pay him a certain amount of money. The stones were to be his, except so far as they might be wanted to build and complete a wall by the way-side. A few months afterwards the plaintiff and his men got out a quantity of the stones by blasting. These stones being in his way and obstructing the work, he found it necessary to remove them, for which purpose, as well as to get a job as a mason, he proposed to the defendants who owned a mill close by, to build for them a dam and breakwater, with the stones on hand and such as he might subsequently blast out. To this proposition they assented, and as a compensation agreed to pay him for his own services and the work of his men, by the day, computing their time while getting out, carting and laying the stone. The defendants were to furnish the powder and cement, and a derrick at the place of the dam. While the execution of the plaintiff's contract with the selectmen was in progress, one of his men, by an overcharge, blew a rock of some two tons upon the mill of one S., crushing in the roof, and doing other damage. For this the plaintiff had been sued and compelled to pay damages, and now sought indemnity from the defendants, insisting that he and his workmen were

hired servants and agents of the defendants. But the courts said: "We are not able to see anything to justify such a claim. There was not clearly the relation of master and servant between the plaintiff and the defendants. The defendants had no control or supervision over the plaintiff's work in blasting this ledge of rocks under the contract with the town of Vernon, and they could not have interfered or arrested the progress of the work had they desired to do so. The plaintiff himself had the sole control and oversight of the work, hired his own men, as many as he pleased, set them to work as he pleased, and dismissed them if they did not serve him with fidelity. He was in no degree a hired servant of anybody. He had bound himself to remove the ledge, and to the defendant he had bound himself that the stones should be laid in their dam and break-water. In getting them out he can order the blasting here or there, one day or the next, in greater or lesser quantities, with powder or otherwise, according to his own judgment and interest, if he but got the road cleared in time, subject to no other man's will or direction. The fact that the plaintiff was to be paid by the day makes no difference, we think, though in a case of doubt this circumstance would have weight. On the whole we see nothing to distinguish this case from the ordinary case of a mechanic or master builder who agrees to furnish materials and build a house, and who is to be paid for his work by the day instead of receiving a gross sum for the job; and such a contractor is in no proper sense a hired servant or agent." *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63.

(8) *Persons operating mines*—The lessees of a shale-pit had contracted with a separate party to work the shale for them on being paid a contract price per ton on the output delivered at the pit-head. This separate party was to supply necessary furnishings, maintain the machinery and fittings, etc., and pay the wages of the men employed. He was also to be liable for all accidents, and to satisfy himself, before commencing to work, that the shaft and all fittings were safe, and it was specially contracted that he and the lessees were not to interfere with one another's workmen. Held, that the party so agreeing to work the shale was a separate contractor, and that the lessees were not liable for injury sustained in his service by workmen, employed by him—that they were his servants, and could look to him alone for reparation. *Grant v. Shaw* (1872) 9 Sc. L.R. 254.

The owners of a gold mine are not liable in a case where a servant in the employ of a person who has taken a contract for the stoking is injured by the negligence of the servants of a person to whom a contract for the trucking and hauling has been let. *Martin v. Sunlight Gold Min. Co.* (1896) 17 New South Wales L.R. 364.

One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, was held to be an independent contractor. *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100.

The inference that an injured person was the servant of the defendants cannot legitimately be drawn from evidence to the effect that his immediate employer had agreed to get ore in the defendant's mine, and deliver it to them upon cars furnished by them at a specific price; that he was to furnish his own labour, tools and other appliances for executing the engagement, and the means and details of its execution were subject to his own exclusive control and management; that he was to select and employ his own assistants, as many as he chose, and pay them such wages as he saw fit to agree to pay; and that with these means the defendants had no concern, and had not reserved any authority or control over them. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103 (question was whether the deceased was a servant in such a sense that recovery could be had for his death under the provisions of the Employers' Liability Act of Alabama).

A workman in a mine cannot recover for injuries received by reason of negligence in its operation, where the evidence is undisputed that, at the time of the accident, and for some months prior thereto, the mine was in the exclusive possession and control of an independent contractor; that he employed and paid the workmen; that he had entire charge of and authority over the mine; and that he had received a fixed rate per ton from the owner for the coal taken therefrom, when the same was delivered to him. *Smith v. Belshaw* (1891) 89 Cal. 427, 26 Pac. 834.

Such contracts as the above are, it will be observed, virtually leases by which the contractor agrees to do certain work on the demised premises. See § 13, post.

(9) *Persons operating quarries*.—An independent contract is shown to have been entered into, where the complaint alleges that the owner of a limestone quarry permitted the employer of the injured person to operate it under a contract under which the latter was to furnish limestone by the cask. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663, affirming, (1899) 93 Me. 17, 44 Atl. 121.

(10) *Persons operating mills*.—In *Burbank v. Bethel Steam Mill Co.* (1883) 75 Me. 373, 46 Am. Rep. 400, where the plaintiff's barn was destroyed by fire communicated from a mill which, while in the possession of a contractor, was set on fire by the furnace of the steam engine, the court laid it down that, if the steam engine and mill were not in fact a nuisance, when they were delivered by the defendants to be used in the performance of the contract, and the plaintiff's injury was occasioned by the negligence of the contractor in not keeping them in proper repair, the defendant was not liable.

(11.) *Master tradesmen and craftsmen*.—A master rigger, employed by the owner of a sugar refinery to bring certain heavy machinery from a railroad train into a refinery, was held to be an independent contractor, as he had the exclusive direction and control of the manner in which the work was to be done. *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

In another case the question, whether a master rigger, employed to do certain work on a building, who hired his own men and furnished his own tools, and received a specified price per diem for the services of his men and the use of his tools, was an independent contractor or a servant, was not specifically decided, as the defendant was held not to be liable under either theory. *Harkins v. Standard Sugar Refinery* (1877) 122 Mass. 400.

On the ground that the evidence showed that the person employed to make repairs on the roof of a church was left entirely free to do the work as he pleased, it has been held that a person carrying on the business of slating roofs, and having a shop of his own and men constantly in his employ to execute the orders received by him, was an independent contractor. *McCarthy v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

(12.) *Persons who furnish teams and men to do various kinds of work*.—The independence of the contract was not disputed in a case where the evidence was, that the person by whose negligence in hauling timber the plaintiff was injured, was not in the defendant's general service, but was engaged for the particular piece of work in question, and brought his own horse for it. *Dalton v. Bachelor* (1857) 1 Foster & F. 15.

Persons who undertake to haul the boats of a coal company on a canal with their own captains, hands, and horses, and are paid a specified price for every ton of coal on the boats, are independent contractors with relation to the company. *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

Where the owner of a sawmill makes an agreement with the owner of teams, that the latter shall haul to the mill and place on rollways logs taken from a lot, from which they have jointly contracted to cut, saw, and deliver the standing timber, the owner of the teams is an independent contractor in hauling the logs. The court observed that the nature of the relation depended upon the character of the arrangements between the defendant and the party hauling the logs, not upon the character of the agreement between them and the landowner.

That the negligent employee was an independent contractor is a necessary inference, where the contract, as proved, only shows that the defendant agreed with a man engaged in an independent employment, to haul sand for it, and to pay him for such service a stipulated price per load, and that no control over him in reference to the mode and manner he was to execute the work he agreed to perform was reserved in the contract; and there is also testimony submitted to the effect that there was no stipulation with the employee as to how he should dig the sand. *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

(13) *Draymen, truckmen, carters, etc.*—The owner of a team and his drivers occupy the position of independent contractor toward a person whose goods are hauled by the teams under an agreed price per week, and a proportionately less price if both teams work less than a full week, where the owner has the exclusive care, control, and management of the teams, and all details as to route and

speed are left to such owner and his drivers. *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513, Aff'd. in (1897) 168 Ill. 514, 48 N.E. 163.

One who does teaming work for a person who merely directs him what to haul and where to, and leaves all details of the work to the employé, is a contractor, not a servant. *McCarthy v. Muir* (1893) 50 Ill. App. 510.

The following also, when they are employed to do work at a certain stipulated price, are regarded as independent contractors, unless there is specific evidence that control was exercised over them.

A licensed public drayman. *De Forrest v. Wright* (1852) 2 Mich. 368.

A licensed public carman. *McMullen v. Hoyt* (1867) 2 Daly 271.

A truckman. *Riedel v. Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 262; *Kuechel v. Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522, Aff'd. (1902) 170 N.Y. 562, 62 N.E. 1096. In the last cited case it was held to be an inference of law that the contract was an independent one, where a truckman employed by merchants to move paper from the second to the fourth floor of a warehouse not belonging to them (such work requiring skill and judgment and being one which the truckman is competent to perform) was given no instructions by the merchants concerning the manner of performance, and employed other men to assist him, paid them for their labour and sent his bill to the merchants.

The fact that a man engaged by an undertaker to drive a carriage at a funeral was the owner of the carriage and horses which he brought, was held to be conclusive proof that he was not the servant of the undertaker. *Bonifaci v. Relyea* (1868) 6 Robt. 397.

The question whether the tort-feasor was an independent contractor or a servant, is for the jury where there is testimony, on the one hand, that he supplied his own men and horses, and was hired by the hour to do all of defendants' trucking, and, on the other hand, that he was under the control of their foreman and subject to his orders and direction, both as to what to do and how to do it, and that the foreman had authority over his men. *Brophy v. Bartlett* (1888) 1 Silv. Ct. App. 575, Rev'g (1885) 37 Hun, 642.

(14) *Keepers of livery stables*.—A jobmaster who lets out horses and carriages is an independent contractor. *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.Q.B. 309; *Quarman v. Burnett* (1840) 6 Mees & W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969.

(15) *Drovers*. In one civil action a licensed drover was held to be a person carrying on a distinct employment, and therefore prima facie an independent contractor. *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B. N.S. 19.

The same doctrine has also being applied in prosecutions for embezzlement. Thus where a man employed to drive pigs to a certain place appropriated the proceeds and absconded, it was held that he could not be convicted of larceny, on the theory that he had possession of the animals as the servant of the prosecutor, where the evidence was that, while he was paid the expenses of the cattle, and the customary mode of the remuneration of such employees was by the day, he was a drover by trade, and, according to the general usage with regard to drovers, had the liberty to drive the cattle of any other person. *Reg. v. Hey* (1849) 2 Car. & K. 985, 1 Den. C. C. 602, Temple & M. 209, 3 Cox C. C. 582, 14 Jur. 154. To the same effect see *R. v. Siffidge* (1853) Legge's Rep. (New So. Wales) 793.

In *Hey's* Case Lord Wensleydale doubted whether an earlier case (*Rex v. M'Namee* (1832) 1 Moody C. C. 368), in which it had been held that the possession of a drover was the possession of the owner of the cattle driven, although such drover was a "general drover," had been correctly decided—at least if he was paid by the day. Another case, *Rex. v. Hughes* (1832) 1 Moody C. C. 370, in which it was held by all the judges that a drover who had been employed in a single instance to drive two cows to a purchaser had been properly convicted of embezzlement, was distinguished on the ground that it was a prosecution under the statute 7 and 8, Geo. 4, chap. 29, § 47, which declares embezzlement by "a servant, or person employed in the capacity of a servant," to be felony.

As between the owner of cattle and a man carrying on the business of a drover, the relation of master and servant cannot be inferred from the mere fact that the cattle were delivered to him with a power of sale. *Reg. v. Goodbody* (1838) 8 Car. & P. 665.

(16) *Persons who undertake various operations connected with the handling of timber.* (See also subd. (12) of this note.) A person who agrees to cut standing trees into lumber at a specified price per 1,000 feet, and hires and pays the workmen by whose labor the work is carried out, is an independent contractor. *Knowlton v. Hoyt* (1891) 67 N. H. 155, 30 Atl. 346.

Testimony to the effect that the negligent person was employed to cut down a certain tree for the sum of ten dollars; that he employed men to assist; and that they were under his control and paid by him, does not even tend to show that the relation of master and servant existed between him and his employer. *East St. Louis v. Giblin* (1878) 3 Ill. App. 219.

One who agrees to cut timber on another's land, at a certain price, and deliver it at the mouth of a specified river, using the employer's dams in driving the logs, if he chooses, is an independent contractor. *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572.

The relation of master and servant does not exist, where an employer makes a bargain with his employé to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, and not rendering any assistance, pecuniary or otherwise, in the cutting or running of the logs. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209; *Easter v. Hall* (1895) 12 Wash. 160, 40 Pac. 728.

Defendants, or the firms of which some of them were members, severally, cut and placed on the ice in the R. river saw-logs, to be floated down the river to their respective mills during the high water in the spring. They or their firms, severally, entered into a written contract with S. & D., by which the latter agreed to take the logs, drive them down, and put them in the booms of the respective owners. Other parties also placed logs in the river to be floated down, and employed servants to drive them. It was held that S. & D. were contractors exercising an independent employment. *Pierrepoint v. Loveless* (1878) 72 N.Y. 211.

Whether a man employed to drive logs on a river was an independent contractor is a question for the jury, where there is evidence tending to prove that he had the full control of the dam and the drive at the time, that he employed all the men and obtained all the supplies, and that the defendants were merely to pay him a compensation for driving their logs. *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N.W. 58.

(17) *Persons employed to clear land.* A person who undertakes to clear a certain piece of land at a specified price per acre or for the whole tract is an independent contractor. *Black v. Christ Church Finance Co.* (1894) A.C. 48, 63 L.J.P.C.N.S. 32, 6 Reports 394, 70 L.T.N.S. 77, 58 J.P. 332, reversing, but not on this point, 10 New Zealand L.R. 238; *Threlkeld v. White* (1890) 8 New Zealand L.R. 513; *Wright v. Holbrook* (1872) 52 N.H. 120, 13 Am. Rep. 12.

The relation of employer and independent contractor was held to be inferable, as a matter of law, where the defendant had leased to H. certain lands to work on shares, and agreed to pay the latter a specified sum per acre for clearing so much of the land as he should choose to clear. *Ferguson v. Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544. The court said: "He (i.e. the person employed), could perform his contract by carting the wood and brush away from the lot, or by burning it upon the lot. The defendant had no right to interfere in the work. Hammond was to employ his own help, and he could control and direct them, and choose his own time, and the defendant had no right to direct or control him in the manner in which he should do the work. He was, therefore, in no sense the servant of the defendant, so that the doctrine of respondeat superior could apply. The defendant was entitled to the results of his labour, and could enjoy its fruits, but he could not direct the manner in which it should be performed."

(18) *Persons cultivating land on shares.* Such persons are not servants or agents of their landlords. *Duncan v. Anderson* (1876) 56 Ga. 398. See also *Ferguson v. Hubbell*, cited in subd. (17) of this note.

(19) *Persons engaged in scavenging work.* Persons who undertake to remove in a specified manner the carcasses of all animals that may die within a certain city, but are not under the control of any person or body representing

the city, are independent contractors. *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

Where a certain person contracted with a city to carry all the garbage and refuse collected within it to some point in Lake Michigan, not less than 15 miles from the city and there dump it into the lake, reserving to itself the right to relet the contract in case of "improper or imperfect performance," the person employed was held to be an independent contractor, on the ground that the city had no right to control the mode or manner of doing the work or to fix the precise place where the dumping should be done. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N.W. 1030.

(20) *Railway companies operating cars on private lines.* Where the defendant, a mining company, constructed and kept in repair a switch track over which cars were run by a railroad company to haul coal from the defendant's mine, it was held that the relation of the former company to the latter was that of shipper to carrier, not that of master and servant, and that the former was not liable to one of its employees injured by a train running on the switch track. *Coal Run Coal Co. v. Strawn* (1884) 15 Ill. App. 347. The court, after advert- ing to the fact that the coal company had given permission to this railroad company to carry over its track, so far and for such purposes as it did, whether by contract or mere license, and that none of the witnesses had stated any fact tending to prove that appellant had in law or pretended to exercise any control over or interference with the owner of running and operating its trains, proceeded thus: "It handled only coal cars, and them only so far as it was necessary in order to load them. On the other hand, it fairly appears that as to the manner of operating and managing the train in all its details, in getting these cars to and from the place where they were loaded, the railroad company acted independently, with its own machinery and by its own servants. All of the train hands were in its employ. Downs, its yardmaster, gave the signal to move the train that ran upon the deceased, and its engineer obeyed it, both acting for said company in the performance of its proper independent contract work, which was to carry the coal for the appellant."

(21) *Persons assisting in public entertainments.* A company which contracts with a city to purchase and set off fireworks, for a designated sum to be paid for the entire service, stands in the relation of an independent contractor in erecting a scaffolding necessary to the display of the fireworks. *Heidenwag v. Philadelphia* (1895) 168 Pa. 72, 31 Atl. 1063.

A balloonist at a pleasure resort is an independent contractor where his agreement provides that he is to furnish and pay for all the material and appliances used in making the ascents, and in addition thereto is to employ and pay all of the men required to conduct the ascents, and that the owner of the resort is to have no part to perform except to furnish the field, pay the price, and name the hour for the ascension. *Smith v. Benick* (1898) 87 Md. 619, 42 L.R.A. 277, 41 Atl. 56.

(22) *Persons conducting departments in stores.*—A contract by plaintiff to conduct a "department" in defendant's store does not create the relation of employer and employé so as to render the former's absence without the latter's consent a breach, where it treats the plaintiff as the principal of the department, makes him the responsible purchaser of the merchandise purchased for it, leaving the defendant merely a guarantor, charges him with store rent and office expenses and with one half of all losses arising from bad debts, reserves to the defendant, as profits merely, a commission upon net sales and interest upon the goods purchased for the department, and requires him to render accounts to the plaintiff. *Lord v. Spielmann* (1898) 29 App. Div. 292, 51 N.Y. Supp. 534.

(23) *Stevedores.*—In several cases it has been laid down, or assumed, that a master-stevedore who agrees, according to the usual practice, to load or unload a ship for a gross sum, and for this purpose to use his own men and appliances is, as matter of law, an independent contractor, where no evidence is introduced which tends to show that he and his men worked under the control and direction of the owner of the ship. *Linton v. Smith* (1857) 8 Gray 147; *Swamy v. Murphy* (1880) 32 La. Ann. 628; *Riley v. State Line S. S. Co.* (1877) 29 La. Ann. 791, 29 Am. Rep. 349; *Rankin v. Merchants & M. Transp. Co.* (1884) 73 Ga. 230, 54 Am. Rep. 874.

In *Murray v. Currie* (1870) L.R. 6 C.P. 26, 40 L.J. C.P.N.S. 26, 23 L.T.N.S.

557, 19 Week. Rep. 104, Bovill, Ch.J., said: "Kennedy, the stevedore, undertook to execute the work of unloading the Sutherland, and for that purpose a steam-winch belonging to the ship was placed at his disposal. The work of unloading was done by Kennedy under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him." The language of Willes, J., is to the same effect: "I am of the same opinion. It is to be observed that this is not a question arising between ship-owner and charterer. The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself."

In another case a ship being discharged of a cargo of sulphur, which was received into lighters of the plaintiff through the "shoot" referred to, which was erected by the men who actually did the work. The defendants were paid by the merchant for discharging his ship; and the case for the plaintiff was, that it was to be inferred from this fact that the men who did the work and erected the "shoot" were in the employ of the defendants; but Martin, B., held that this was not a legitimate inference, whether of law or fact; and that the above fact was not sufficient evidence to support it, for the work might have been done by the men under some sub-contract. Upon its being shown by the evidence of the stevedore, who was called as a witness, that the work had actually been done on this footing, a nonsuit was directed. *Woodward v. Peto* (1862) 3 Fost. & F. 398.

In Pennsylvania, however, the character of the relation between a stevedore and his employer has been held to be one for the jury in two cases, in which the question was whether the crew of the ship and the stevedore's workmen were co-servants. *Hass v. Philadelphia & S. Mail S. S. Co.* (1879) 88 Pa. 269, 32 Am. Rep. 462, following *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2. In the first cited of these cases a steamship company made a special contract with a stevedore to unload and load its vessels at New Orleans. Neither the master of the vessel nor his crew had anything to do with the work, which was in the exclusive charge of the stevedore, who employed his own men and used his own machinery and cargo planks. A seaman on one of the company's steamers, while on duty as a night watchman, having stepped on one of these planks, which tilted, he was thrown overboard and seriously injured. He brought suit against the company for damages, which he alleged was occasioned by the negligence of the company's servants. Held, that the questions whether the stevedore was an agent of the company or an independent contractor, and whether the plaintiff was a fellow servant in a common employment with the stevedore and his servants, were properly submitted to the jury.

(24) *Construction and repair of ships.*—That a "lumper" was an independent contractor was held to be a necessary deduction from undisputed evidence that he employed and paid a gang of mechanics, and that by the terms of his agreement he was to erect a specified scaffold, to grave the vessel, put on the felt, and run the metal, and was to receive four cents for every sheet that went on the ship. *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N.E. 1017.

(25) *Transfer Agents doing business on railway trains.*—It cannot be said as a matter of law that a member of a firm of transfer agents, permitted by a railroad company to check baggage on its trains, is an employé of the railroad company within the meaning of the Kentucky statute relating to the recovery of damages in case of a fatal accident. *Mefford v. Louisville & N. R. Co.* (1892) 14 Ky. L. Rep. 327, 20 S. W. 263.

(26) *Contractors not within purview of statutes relating to servants only.*—This note may be appropriately concluded with a citation of the cases which illustrate the principle, that contractors are neither entitled to the benefits conferred, nor

12 a. Liability arising from the employment of a tug.—(a) English doctrine as to the relation between the owner of a tug and its tow.—

In England the courts have taken the position that "the tug is in the service of the tow," and that "the tow is answerable for the negligence of her servant" (a). This doctrine is based on the

subject to the burdens imposed, by legislation which, upon a reasonable construction of its provisions, must be taken to be applicable only to servants.

A contract to weave certain goods at the house of the weaver is not a contract to serve, within 4 Geo. 4 c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver, for neglecting his work after commencing the same. *Hardy v. Ryle* (1829) 4 M. & R. 295; 9 B. & C. 603, (holding that a conviction could not be sustained which was based upon an information charging that the employé had "contracted and agreed" to weave, etc.)

Bayley, J., said: "There is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them."

On the ground that an information laid under the same statute showed that the plaintiff and defendant "stood in the situation of contracting parties" for the making of the road in question, it was held that as a charge to the effect that the plaintiff had contracted with B. to build a wall for a certain price, within a certain time, and, having performed part of the work, refused to complete it, was insufficient to sustain a conviction. *Lancaster v. Greaves* (1829) 9 B. & C. 628.

In a Canadian case it was held that a medical officer was not within the purview of an Act by which the salaries of "servants" and "employés" were exempted from attachment (37 Vict., ch. 13, § 1). *Macfie v. Hutchinson* (1870) 12 P.R. Ont. 167. O'Connor and Amour, JJ., were of opinion that, upon the true construction of the statutes under which the defendant was appointed, his duty was to exercise his professional and scientific skill and judgment independently, free from the control and direction of any other person; and that he was therefore not a "servant" nor a clerk, as such a position implies control and direction. They also considered that he was not an "employé," since he was appointed, not employed, to perform the functions of his office. Wilson, C.J., thought that he was embraced within the word "employé," but conceded that he was not a "servant."

A person who agrees to manufacture an indefinite or specified quantity of a certain article, for which he is to be paid according to the amount produced, and who is not bound by his contract to do any part of the work personally, is not within the scope of the English Truck Act. See *Ingram v. Barnes* (1857) 7 El. & Bl. 115, affirmed Exch. Ch. 7 El. & Bl. 132; and the other cases cited in § 26, note (a), post.

In *Sleeman v. Barrett* (1864) 2 Hurlst. & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L.T.N.S. 834, 12 Week. Rep. 411, it was held that this Act was not applicable to a "butty collier," i.e., a man who contracts for the digging of coal by the day, the ton, or the piece, and employs others to assist him.

On the other hand, such a person has been held to be a "servant" of the mine-owner within the meaning of the embezzlement statutes. *Reg. v. Thomas* (1853) 6 Cox C.C. 403.

(a) *Union S. Co. v. Owners of the "Aracan"* (1874) L.R. 6 P.C. 127.

In one case it was argued specifically that the relation of the tug-owner to the tow-owner was that of an independent contractor, and that the principle of the case of *Quarman v. Burnett* (1840) 6 M. & W. 499, was therefore applicable, so that the tow-owner and his vessel would not be responsible for the negligence of the tug-owner and his servants. *The Niobe* (1888) L.R. 13 Prob. Div. 55. In rejecting this contention Hannen, P., said: "It appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she

principle that the " motive power " is in the tug, and the " governing

should efficiently execute this command it is necessary that she should have a good look-out and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognised in the House of Lords in *Spaight v. Tedcastle*, 6 App. Cas. 217, where Lord Blackburn says that it is the duty of the tug to carry out the directions received from the ship, and of the Privy Council in *The American and The Syria*, L.R. 6 P.C. 127. Although in this latter case it was held from the special circumstances that the command belonged to the tug and not to the tow, I may observe that it is clear from the evidence in this case that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a look-out and check the tug if it were going wrong. But it was argued, that whatever the relation of the tug and tow may generally be, they were reversed in this case by special circumstances: first, by the contract of towage between the parties. But there is nothing in the contract but a bare agreement to tow. Secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist on a river towage with a shorter scope of cable. I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug. If it had been shown that the " Flying Serpent " had, by some sudden manoeuvre, which those on board the " Niobe " could not control, brought about the collision, I should have held the " Niobe " blameless. Thus, in *The Stormcock*, 4 Asp. Mar. Cas. 410, I held the tug to be responsible, because the tug which was originally steering a safe course so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case the action of the " Flying Serpent " was not sudden, and might have been prevented by those on board the " Niobe," if they had done their duty.

That some at least of the English judges are not entirely satisfied with the doctrine thus established is indicated by the following passage in an opinion delivered by Hannen, P.: " As to the liability of the tow it seems to have been admitted by both the learned Counsel that the tow was responsible for the negligence of the tug. I confess I have been somewhat astonished to find to what extent that principle has been carried by my learned predecessors. But for these decisions, based, according to Dr. Lushington, on considerations of expediency, that there should not be a divided command, I myself should have been inclined to think that the decisions of the American Courts establish a rule more in accordance with my own idea of justice; that is, the particular circumstances should be looked to in each case to see whether the tug or tow, or both, are liable. But I accept the decisions of Dr. Lushington, treating the tug as the agent or servant of the tow." *The Stormcock* (1885) 5 Asp. Mar. Cas. 470.

In *Union S. Co. v. Owners of the Aracan*, ubi supra, we find the following explanation of the difference between the English and American doctrines: " It appears that; in the large American rivers and lakes it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American courts have held that a vessel towed is not liable for the negligence of the tug, because the ' governing power ' is in the tug not in her."

The explanation thus given of the American cases is apparently taken from the opinion in *The Belknap* (1873) 2 Low. Dec. 281; but it will be apparent, from an examination of the American cases cited below, that the doctrine which they embody is not based wholly on the narrow grounds specified in this passage.

power" in the ship towed (*b*). The situation thus contemplated is presumed to exist, unless the evidence discloses conditions different from those which are ordinarily incident to the performance of such contracts (*c*).

The tug and the tow are sometimes said to constitute together one vessel in the intendment of the law (*d*). But this doctrine of identification cannot be invoked for the purpose of enabling the owner of a tow which is in charge of a licensed pilot to escape liability for the negligence of the crew of the tug, on the ground that the employment of the pilot was compulsory. The exemption accorded in cases where the employment is of that character is not applicable to the tug as well as the tow (*e*).

(*b*) *American doctrine*.—In America the owner of a tug is regarded as being, under ordinary circumstances, an independent contractor, whose negligence is not imputable to the owner of the tow (*f*).

(*b*) *The Cleadon*, 14 Moore P. C. 97.

(*c*) Such a case was held to be presented where a steamer had taken in tow another steamer which had been disabled on the high seas, and, so far as appeared, the "governing power" lay wholly with the tug. *Union S. Co. v. Owners of the "Aracan"* (1874) L.R. 6 P.C. 127.

(*d*) *The Cleadon*, 14 Moore P.C. 97.

(*e*) "The root of the exemption in the case of compulsory pilotage is that the pilot is not the servant of the owner of the towed ship, but a person forced upon him by the statute; but the relation of the owner of the ship to the tug is very different. The tug is his servant voluntarily taken and employed by him for the occasion. The law implies, when the tug is employed, a contract between the owner or master of the tug and the owner of the ship to the effect that the tug will obey the directions of the ship-owner and act as his servant; but this contract does not affect third parties, and the principle which exonerates the ship in the case of the pilot does not apply to the tug. It has been said, indeed, in various cases, that the tug and the vessel she has in tow are to be regarded as one vessel; but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel. The master of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot." *The Mary* (1879) L.R. 5 Prob. Div. 14.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a steam-tug, and the steam-tug, without waiting for orders from the pilot, suddenly adopts a wrong manoeuvre, and so causes the ship to come into collision, the owners of the ship are responsible. *The Singuasi* (1879) L.R. 5 Prob. Div. 241.

(*f*) In an early Massachusetts case it was held that, as the owner of a steamboat engaged in towing vessels up and down a river, for a certain toll or hire, was following a trade which was as much a public and distinct employment as that of freighting or carrying passengers, the owner of a ship which was being towed was not liable for a collision caused by the negligence of the crew of the steamboat. *Sprout v. Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec. 350.

The relation which a towing company owning a tug employed to tow a canal boat by a charterer of such boat bears to such charterer, is that of an independent contractor, where such company is engaged in the business of towing. *McLoughlin v. New York Lighterage & Transp. Co.* (1894) 7 Misc. 119, 27 N.Y. Supp. 248.

In the following passage from the judgment of the Supreme Court of the United States in *Sturgis v. Boyer* (1860) 24 How. 110, the non-liability of the owners of the tow is deduced from the fact that the crew are not their servants; but this fact itself is manifestly an inference from the assumed ultimate fact, that the owners of the tug are, under ordinary circumstances, independent contractors. "The only remaining question of any importance is, whether the ship and the steam-tug are both liable for the consequences of the collision; or if not, which of the two ought to be held responsible for the damage sustained by the libellants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master and crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided that she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute

(c) *Liability of Harbour Commissioners.*—The relation which a Board of Harbour Commissioners bear to persons who undertake to furnish tugs for the purpose of towing ships in and out of the harbour which they control is the same as that which an employer ordinarily bears to an independent contractor (g).

18. *Liability arising out of certain other contracts of an independent nature.*—So far as regards the non-liability of the contractee for the torts of the contractor, the juridical situation is essentially the same as that which is exemplified by the situations so far cited, where the relations of the parties are fixed by a contract which is not one of employment, but which contemplates as one of its incidents, the performance of a given piece of work, or the carrying on of certain continuous operations. To this category belong leases of railways, which are demised with a view to their being kept up as going concerns. In all such cases the general rule (see Woodf. L. & T. pp. 793, et seq.), that the lessor is not liable for the torts of his lessee, produces the same results as if the position were considered with direct reference to the fact that the contract is in effect one for the performance of work by a

the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owner of his own vessel, and they are responsible for his acts in her navigation." *Sturgis v. Boyer* (1860) 24 How 110 (123).

This statement of principles was followed, as being correct, in *The Mabey and Cooper* (1871) 14 Wall. 204. See also to the same effect, *The Belknap* (1873) 2 Low. Dec. 281.

These Federal decisions override the effect of an earlier one, *Smith v. The Creole* (1853) 2 Wall. Jr. 485, in which the English doctrine was adopted with respect to vessels towed in and out of harbours, and the non-liability of the owner of the tow was restricted to cases where canal boats or other like vessels are towed by steamers.

(g) By an act for improving and maintaining a harbor, commissioners were empowered to build or provide steam tugs for towing vessels into or out of the harbor, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of steam vessels to perform this duty for them at certain rates of charge; the commissioners paying them in addition a sum annually, and the vessels being placed under the direction and control of the harbour master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of a tug, while being towed into the harbour, the owner brought an action into the county court against the commissioners, and under the direction of the judge recovered a verdict. The court, on appeal, set aside the verdict; holding that the decision of the judge could not, upon any "inference which could be legitimately drawn from the facts" before him, be correct in point of law. *Cuthbertson v. Parsons* (1852) 12 C. B. 304, 16 Jur. 860, 21 L.J.C.P.N.S. 165.

person not in the service of the contractor (a). The same remark is applicable to leases of mines (b), of mills (c), and of ferries (d).

Other cases in which the contract was not one of employment, except in the secondary sense that it involved the performance of some specific kind of work, and in which the contractee was held not to be liable for the torts of the contractor, are those which involve sales of various commodities (e).

(a) In *Harper v. Newport News & M. Valley R. Co.* (1890) 90 Ky. 359, 14 S.W. 349, the lessor company was held not to be liable, where a man was run over owing to negligence of servants of the lessee company. For the rule in cases where the right of recovery depends on the validity of the lease, see § 62, contra.

(b) *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499.

(c) It has been held that the lessees of mills in possession and control, and operating them, cannot be held to be "in the employ" of the owner and lessor, nor can the agent of the owner and lessor be held as the "owner" or "occupant" of the mills, under the Maine statute 1868, chap. 448, for throwing slabs and refuse into Penobscot River. *State v. Coe* (1881) 72 Me. 456.

(d) *Duncan v. Magistrates of Aberdeen* (1877) 14 Sc. L. R. 603; *Bowyer v. Anderson* (1831) 2 Leigh, 550; *Blackwell v. Wiswall* (1855) 24 Barb. 355, (affirmed on appeal, see note at the end of the report); *Norton v. Wiswall* (1858) 26 Barb. 618, cited in *Crusselle v. Pugh* (1881) 67 Ga. 430, 44 Am. Rep. 724, in support of the general rule that a lessor is not liable to a servant of the lessee for damages resulting from the negligence of the latter, unless some duty remained upon the lessor from a failure to perform which the injury arose.

In *Felton v. Deall* (1850) 22 Vt. 170, 54 Am. Dec. 61, the legislature of New York had granted to Deall the right, for a specified time, to maintain and use a ferry across Lake Champlain. Having established the ferry, the licensee entered into a contract with one H., by which he was to keep and manage the ferry, at his own expense of labor, for one year. The expenses of repairs were to be equally borne by the parties, and the receipts of the ferry were to be equally divided between them. H. further agreed, that he would not allow any but a faithful, honest, obliging, and temperate man to attend the ferry, and that he would be responsible for damage occasioned by willful misconduct or neglect in its management. While H. had charge of the ferry under this contract, the boat was upset and the plaintiff and his property injured. It was held that the contract being such as to vest the occupancy and control of the ferry in H., as the tenant rather than the servant of defendant, the defendant was not responsible for his acts.

(e) Where a city purchases lumber and the vendor in delivering it wrongfully piles it in the street, such vendor is not the agent of the city, but an independent contractor, for whose negligence the city is not responsible. *Evansville v. Senhenn* (1898) 151 Ind. 42, 41 L. R. A. 728, 734, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88.

The owner of a building is not answerable for the negligent manner in which a coal company having a contract to furnish the owner with all the coal necessary for running his machinery performs its contract in delivering the coal through a scuttle-hole in the sidewalk. *Benjamin v. Metropolitan Street R. Co.* (1896) 133 Mo. 274, 34 S.W. 590.

A person who sells and delivers stone for the purpose of repairing a road is a contractor within the meaning of the Statute of Upper Canada, 16 Vict. chap. 190, declaring "contractors" to be liable for leaving materials so as to obstruct a road. *Lennox v. Harrison* (1858) 7 U. C. C. P. 496.

Compare with these decisions the ruling, that one engaged in selling and delivering wood to the proprietor of a mill at so much per cord is not an employé of the proprietor so as to put him in the situation of one who takes the risk upon

Reference may also be made in this connection to the rules that a shipowner is not liable for the torts of one who charters his ship on a footing which divests him entirely for the time being of the control of the ship and her crew (*f*); that a bailor is not liable for the torts of the bailee or of the bailees' servants (*g*); and that a licensor who has surrendered to a licensee the possession of a portion of his premises, to be used for a lawful purpose, is not liable for injuries caused by a nuisance which the licensee has created or suffered to exist on the property thus transferred to his control (*h*).

14. Reservation of a limited power of control, effect of. Generally. —To every agreement by which one person undertakes to produce certain concrete results for the benefit of another, there is manifestly attached an implied condition that the latter person shall have the right of refusing to accept the results finally obtained if they do not constitute a satisfactory execution of the agreement. As a matter of ultimate analysis, this conception may be regarded as the basis of the well-settled doctrine, that the independence of a contract is not destroyed by the inclusion of provisions which although they entitled the employer to exercise a certain measure of control, go no further than to enable him to secure the proper performance of the work (*a*). In other words, the relation of

himself of negligence in those running the mill. He stands towards the proprietor "precisely as any other man stands who, in consequence of his business wants, had occasion to visit the mill." *Wadsworth v. Duke* (1873) 50 Ga. 91.

(*f*) *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 8 Dowl. & R. 550, 4 L.J.K. B. 309, per Littledale, J., arguendo; III. Kent Com. 138; Parsons, Shipping & Adm., chap. VIII, § 2; Abbott, Shipping, p. 58, et seq.

(*g*) *New York L. E. & W.R. Co. v. New Jersey Electric R. Co.* (Sup.) 60 N. J. L. 338, 38 Atl. 828, Aff'd (memo.) in 61 N. J. L. 287, 41 Atl. 1116.

The existence of this rule was assumed in *R. v. Gibbs* (1855) Dears C. C. 445.

(*h*) *Gwathney v. Little Miami R. Co.* (1861) 12 Ohio St. 92, where a foot-passenger fell through a railway bridge which the public were permitted to use, on a track which a licensee company had built to connect its own system with that of the defendant. Whether the licensee company created the nuisance, and had the sole possession and use of that track thence forward until the occurrence of the injury complained of, was held to be a question of fact which was properly left to be ascertained by the jury from the evidence.

(*a*) "Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to a servant or workman (he is always liable), but to him who had the personal control over him, who was his superior in the sense of the maxim [i.e., *respondeat superior*] On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly

master and servant is not inferable from the reservation of powers which do not "deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with his contract" (δ).

For the purpose of exemplifying the operation of this rule, it will be convenient in the first place to state in extenso the effect of a few typical contracts which have been discussed by the courts, and afterwards to show in detail the result of the decisions dealing with each one of the specific provisions which are found in these or other contracts (c).

done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence." *Stephens v. Thurso Police Comm'rs.* (1876) 3 Sc. Sess. Cas. 4th series, 542. This statement of principles was quoted with approval in *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265.

If the other provisions of the contract are such as to render the person employed an independent contractor, he will not be converted into a servant by the insertion of stipulations reserving to the employer "the right to change, inspect, and supervise to the extent necessary, to produce the result intended by the contract." *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N. E. 91.

(b) A phrase used by Rigby, L.J., in *Hardaker v. Idle District Council* [1896] 1 Q.B. 335, 353, 65 L.J.Q.B.N.S. 363, 75 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196.

In a Canadian case, Osler, J.A., expressed the opinion that the legal criterion for determining the question, whether the relation of master and servant existed, was, whether the alleged master had the power of controlling the work which the alleged servant was doing for him "in respect to anything not necessarily involved in the proper doing of the work." *Saunders v. Toronto* (1899) 26 Ont. App. 265.

(c) In *Hardaker v. Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196, the contract under review, which was one for laying gas-pipes, contained the following clauses, among others:—

(1) "The contractor to execute the whole of the work in the most workman-like and substantial manner, particular attention being paid to any directions or instructions of the inspector (of the board), which may be given by him from time to time as the work proceeds, and, if any difference of opinion shall arise as to the description, quality or quantity of materials or workmanship, or anything relating to the works, the opinion of the inspector shall be final and binding on all parties concerned."

(2) "The contractor shall give or provide all necessary personal superintendence during the execution of the works, and shall employ competent foremen to superintend the same during their progress, and should any such foremen, or the contractor's workmen, at any time disobey the orders of the inspector, or conduct themselves improperly, or be in his opinion incompetent, the inspector shall have full power to discharge them forthwith."

(3) "The inspector shall have power to stop the works, or any portion thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of materials to be used from time to time, and such alterations shall not annul or invalidate the contract, which shall, nevertheless, remain in full force and effect."

(4) "The care of the entire works until their completion shall remain with the contractor, who shall be held responsible for all accidents and damage to

persons or property arising therefrom from any cause whatsoever. . . . The contractor shall, at his own expense, protect all walls, buildings, gas-pipes, water-pipes, or other property which may be laid bear or otherwise interfered with, and make good any such property which may be . . . injured during the progress of the works or in consequence thereof; and shall also make good all damage occasioned by delay or neglect, or carelessness, deficiency in strutting, fencing, watching, or lighting, either to the works or to the buildings or premises adjoining or near thereto, whether such damage or defects be discovered during the progress of the work, or appear or become known after the completion thereof. . . . In case of any claim, action, suit, or proceedings being brought or taken against the local board, or any of their officers or servants, in respect of any loss, damage or injury caused by the works, or consequent thereupon, the contractor, or his sureties, shall fully indemnify them and each of them therefrom."

(5) "Where gas or water-pipes are found in the line of the sewers, care shall be taken that no breakages occur. Where needful the contractors shall place strong timbers across the trench and sling the gas or water pipes to them by wrought iron chains of sufficient strength."

(6) "Where in the opinion of the inspector it is desirable so to do, the contractor shall lower the timbers and slings to or below the level of the adjacent surface and build up concrete walls thereunder; in such cases the contractor will be paid the value of the timbers, slings, concrete and labour, provided he has, as is herein provided, obtained the written certificate of the inspector, or his written order, for such extra works."

By Lindley and Smith, L. L. J., it was held that there was nothing in the provisions of the contract from which the existence of the relation of master and servant could be inferred. Rigby, L. J., dissented as to this point. He considered that, independently of the wide general provisions contained in paragraph (1), (2), (3) and (4) it was made plain by paragraphs (5) and (6) that the defendant's inspector was to have full control over the means adopted for the protection of the gas and water-pipes out of which the accident arose. The difference of opinion thus disclosed is not surprising, for the contract is couched in terms which, to say the least, rendered it very difficult to say that the contractor could act with greater freedom or independence than a hired servant.

In *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32, a contract for the construction of a sewer, provided that the defendant borough was authorized by its engineer, or such other person or persons, or in such other manner as it may deem proper, to inspect the materials to be furnished and the work to be done under the agreement, and to see that the same corresponded with the specifications. In the specifications were the following provisions: That the work should all be backed in carefully, rammed and packed in and around the sewer, with proper tools, by trusty persons, "approved by the engineer," and no tunneling would be allowed, "except by written permission of the engineer;" that if, in excavating for any sewer or branch thereof, any water pipe, gas pipe, or other obstruction be met with, that "in the judgment of the engineer should be avoided," then the party of the second part, (the contractors) after the same should have been measured by the engineer, should immediately fill such excavation; that the work should be prosecuted at and from as many different points in such part or parts of the avenues or streets on the line of the work as the engineer might "from time to time, during the progress of the work, determine"; that plank foundations should be laid, "when necessary in the opinion of the engineer"; that all work to complete drainage should be done according to the plans, etc., and "in accordance with all the directions of the engineer" of the sewer committee; that, in cases of rock blasting, the blast was to be carefully covered with heavy timber, "according to the ordinances of the court of burgeses relative to rock blasting, which were to be strictly observed"; that certain rock should be excavated with as little blasting as possible, and "under the immediate supervision and direction of the engineer or his assistant"; that, if any person employed by the contractor on the work should appear to the engineer to be incompetent or disorderly, he was to be discharged immediately, "on the requisition of the engineer," and such person was not to be again be employed upon them "without permission of the engineer"; that, if any materials or implements should be brought to the ground which the engineer might "deem to be

of improper description or improper to be used in the work, the same should be removed forthwith." Discussing the effect of this contract, the court said: "These provisions, and others of similar import in the contract and specifications, certainly denote that a high degree of power, to be exercised in the supervision of the work and to insure its performance by the contractor, was reserved by the defendant borough to its agents, acting in its behalf; and, when coupled, as it is, with other provisions providing for the responsibility of the contractor 'for all damages which may happen to neighboring properties, or in any way from neglect,' and that he shall at his own expense, 'shore up, protect and make good, as may be necessary, all buildings, walls, fences or other properties which may be disturbed or injured during the progress of the work'—fairly indicate that an intention existed on the part of the borough to reserve such control as in the judgment of its advisers was inconsistent with such immunity from liability as it is now claimed in its behalf. But on the whole we are inclined to think that the weight of authority upon this question justifies us in holding that the reservation of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labour, especially in the particulars in the execution of which the plaintiff claimed that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant; and that these considerations relating to general control constitute the true test by which to determine whether the relation be that of employer and contractor or that of master and servant."

The contract in *Harding v. Boston* (1895) 163 Mass. 14, 39 N.E. 411, which was also for the construction of a sewer, provided, among other things, that the contractor was "to furnish all the materials except as hereafter specified, and do all the work according to the plans and specifications" set out; that the excavation was to be "made true to the line and grade as given to the contractor," and, if the material was unsuitable for forming the bottom, a further depth was to be excavated, "as directed by the superintendent or inspector in charge;" that only such length of trench was to be opened at once "as directed by the inspector;" that the earth excavated was "to be compactly placed along the trench, so as to be as little annoyance as possible to abutters, . . . and no obstruction to be placed upon the sidewalks;" that the trenches and banks were to be kept lighted and fenced, as provided in city ordinances; that the contractor was to be "responsible for all damage arising from, or in consequence of, the construction of the sewer;" that all sewers or drains were to be connected with the work, "as directed by the superintendent or inspector;" that the earth was to be removed, and the street cleaned up, as the work proceeded, "to the satisfaction of the inspector;" that certain notice was to be given by the contractor to any railroad corporation before entering on its location, "and every provision for safety required by them, or by the inspector, to be complied with;" that certain notice was also to be given to any street railway corporation, in crossing or in opening trenches beneath its tracks, and the work performed so as to permit the passage of cars, "unless by special direction of the superintendent;" and that the work was to be finished by a date named. The contract also contained the following clauses: "The work to be kept perfectly clean from dirt, brick-bats, etc., as built, and the whole done to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times." It was held that none of these provisions destroyed the independence of the contractor.

In *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91, another contract for the construction of a sewer, provided that "the city engineer" was to "have the right to regulate the excavation," and not "more than 400 feet of trench" was to be opened at one time without his permission, while the commissioner of city works was authorized to "change at his discretion the amount of all the various kinds of work and materials and structures." The contractors were required to observe all the ordinances of the common council in relation to obstructing the streets, and "in all cases of rock blasting, the blast" was "to be carefully covered with heavy timber, according to the ordinances of the common council" relating to the subject, "which ordinances shall

be strictly observed." If any person employed by the contractor should "appear to the engineer to be incompetent or disorderly" he was to be discharged and not employed again without permission. The engineer, with the consent of the commissioner, had power "to vary, extend or diminish the quantity of work during its progress without vitiating the contract." It was also provided that "all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer." The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer "should deem to be of improper description or improper to be used in the work," were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completion and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications also contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers. It was held that there was nothing in the terms of the contract that required the conclusion that the contractor was a servant.

In a case where the relation of a railway company to one who had contracted for the building of the road was in question, the provisions upon which the plaintiff unsuccessfully relied, for the purpose of establishing his contention that the contractor was a mere servant were thus grouped together by the court: The work was to be done "subject to the approval of the chief engineer." The company was to retain regularly in its service an assistant engineer to direct the execution of the work. The contractor was to increase the force, "whenever required by the chief engineer." If he failed to complete the work within the time stipulated, the company might hire hands to complete it at his expense. He was to discharge any employee who should, "in the judgment of the chief engineer, or assistant in charge of the work," be unfaithful, unskillful, or remiss in the performance of the work, or guilty of riotous, disrespectful, or other improper conduct. He was to be responsible for damages as between himself and the company. All trees, logs, bushes, and other perishable material were to be removed to the outer limits of the clearing or burned up. Reviewing these stipulations, the court said: "We suppose, if the contract had not contained the conditions and limitations above, that it could hardly be contended that Hardin was not an independent contractor. Do these conditions destroy and negative that feature? We think not, for the reason that they do not apply to the mode and manner of having the work done, nor do they in any way take said work out of the hands of Hardin [the contractor]. They are nothing more than certain rules under which the work was to be done by Hardin, and intended to guarantee the faithful execution of the specified work. We do not see why one working under specified rules may not be an independent contractor, as without such rules. One contracting to build a house, according to specifications and plans drawn by an architect, and under the inspection of the architect, which is usually the case, would, none the less, be an independent contractor, because of the presence and inspection of the architect. The point is, who is doing the work? Is the company doing it by its employés, or is the contractor by his? The company certainly had the right to see that the contractor was doing the work according to the contract, and that he employed skillful and proper laborers, and the regulations above were, as it appears to us, intended to accomplish this end—nothing more." *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

In *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461. where the contract contained the following provisions, it was held that the right of direction reserved to the engineer related only to the quantity of work to be done in the construction of the road, or to the condition of the work when completed, and not to the mode or manner of doing the work.

(1) The work of grubbing and clearing, excavation, embankment, is to be done as prescribed in the specifications, and agreeably to the directions, of the said engineer or his assistants.

(2) Clearing. The entire ground on which embankments and excavations are to be made, and such additional width, not exceeding fifty feet on each side, as the engineer may direct, shall be cleared of all trees. The fences on the line of

15. **Effect of clauses relating to the supervision of the work.**— In applying the rule enunciated in the preceding section the courts have held that provisions of the following tenor may be inserted in a contract without destroying its independent character: That the employer's agent shall have the right of supervising, inspecting, or superintending the work for the purpose of seeing that it is done according to the specifications (a); that suitable

the road which are not removed by the owner shall be cleared off by the contractor and piled up and preserved for the use of the owner, on the direction of the engineer.

(3) Earth work. In grading the roadbed increased width shall be made for passing places or side-tracks, "at such places as the engineer may direct."

(4) Excavation will include all cuttings necessary to or connected with the railroad, "and which shall be directed by the engineer." Excavations will be of such width and depth, and with side slopes of such inclination as the engineer may direct."

(5) Earth from roadway excavations is to be hauled into embankments, "as far as the engineer directs," not exceeding two thousand feet. Spoil banks are to be so formed as to slope backward from the roadbed excavation in such manner as the engineer shall direct. Rock excavations will be fourteen feet in width at grade, "with such side slopes as the engineer shall direct."

(6) Embankments for roadbed or for whatsoever purpose incidental to or connected with the construction of the railroad, and which "may be required by the engineer in charge, shall be built at his direction."

(7) The form and dimensions of embankments "shall conform to the stakes and directions of the engineer," and embankments which will be required about masonry shall be built at such time, and in such manner, and of such material, "as the engineer shall direct." Embankments shall be built of such height and width as will, "in the opinion of the engineer," leave them of full size when they shall have become fully settled and compact. Borrowed earth to form embankments will be taken from such place as may be selected by the engineer.

(8) All of the work shall be done in a neat, substantial and workmanlike manner, and in all respects fully completed, "to the satisfaction of the engineer in charge."

(9) The work embraced in the contract "shall be prosecuted with such force as the engineer may deem adequate to its completion within the time specified; "and it at any time the contractor shall refuse or neglect to prosecute the work, with a force sufficient in the opinion of the said engineer to secure its completion within the time specified, the engineer, or such other agent as he may designate, may, on ten days' notice, proceed to take possession of, and use in completing the work, the tools, etc., belonging to the contractor, and employ such number of men as may in his opinion be necessary to insure the completion of the work within the time specified, charging over the expenses so incurred to the contractor, and if the contractor shall fail to prosecute the work with an adequate force, or to comply with the directions of the engineer in regard to the manner of performing it, or in any other way neglect the requirements, of the agreement and specifications, or if he shall do any portion of the work embraced in this contract in an unfaithful and unworkmanlike manner, "the engineer may, at his discretion, declare this contract, or any portion or section embraced in it, forfeited."

(a) In one case we find the broad rule laid down that the mere right of the defendant to supervise the work so far as to see whether it was done according to contract does not throw the responsibility, if any, of the contractor on the employer. *Welsh v. Lehigh & W. Coal Co.* (1886) Pa. 3 Cent. Rep. 386, 5 Atl. 48.

"It is now an accepted rule that supervision of such work, (i.e. the building a railway) may be retained without interfering with the independent action or liability of contractors who have engaged to perform it or subdivisions of it."

material is to be furnished, and a specified structure erected, subject to the daily approval of the employer's engineer (b); that the work is to be "under the supervision and subject to the approval" of the employer or his agent (c); that the work is to

Larson v. Metropolitan Street R. Co. (1892) 110 Mo. 234, 16 L.R.A. 330, 34 Am. St. Rep. 439, 19 S.W. 416.

"Although the employer may have had an agent, who supervised the work for the mere purpose of seeing that it was done in conformity to the contract, without interfering as to the particular method in which it was done or the means by which a given result was to be accomplished, that would not be in law a control and direction of the work by her; and she would not be responsible for the manner in which the work was done." *Harrison v. Kiser* (1887) 79 Ca. 588, 4 S. E. 320 (language of head-note prepared by the court).

An employer cannot be held liable for the acts of a contract merely because his engineer has a general supervision of the work, where the power of such engineer is "limited to the manner of its accomplishment and the time within which it should be finished, rather than the means to be used." *Edmundson v. Pittsburgh M. & T. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

A contract is none the less independent because the employer's representative has the right to see that the work is properly done. *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334.

In *Heedie v. London & N.W.R. Co.* (1849) 4 Exch. 244, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. 65, a provision by which the employer reserved a general power of watching the work was treated as immaterial. In fact it was not even contended by counsel that it changed the relation of the parties to that of master and servant.

To the same effect see the following cases: *St. Louis A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Normalk Gaslight Co. v. Normalk* (1893) 63 Conn. 495, 28 Atl. 32; *Nevins v. Peoria* (1886) 41 Ill. 502, 89 Am. Dec. 392; *Pfaw v. Williamson* (1872) 63 Ill. 16; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17; *Bayer v. Chicago M. & N. R. Co.* (1896) 68 Ill. App. 219; *Gary v. Chicago* (1895) 60 Ill. App. 341; *Fitzpatrick v. Chicago & W. I. R. Co.* (1889) 31 Ill. App. 649; *Ceist v. Rothschild* (1900) 90 Ill. App. 324; *New Albany Forge & Rolling Mill v. Cooper* (1891) 131 Ind. 363, 30 N. E. 294; *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa 267, 60 N. W. 640; *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411; *Go-ham v. Cross* (1878) 125 Mass. 232, 28 Am. Rep. 234; *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Crenshaw v. Ullman* (1892) 113 Mo. 633, 20 S. N. 1077; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032; *Jaskoey v. Consolidated Gas Co.* (1901) 33 Misc. 790, 67 N. J. Supp. 976; *Gardner v. Bennett* (1874) 6 Jones & S. 197; *Clare v. National City Bank* (1875) 8 Jones & S. 104; *Reed v. Allegheny* (1875) 79 Pa. 300; *Way v. Evans* (1875) 80 Pa. 102; *Welsh v. Parish* (1892) 148 Pa. 599, 24 Atl. 86; (1) *Simontom v. Perry* (1901) Tex. Civ. App. 62 S. W. 1090; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163.

(b) *Casement v. Brown* (1893) 148 U.S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672. The court said: "This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract. . . . They were to see that the thing produced and the result obtained were such as the contract provided for."

(c) *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N.W. 957; *Eaton v. European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017; *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401.

be "done to the satisfaction" of the employer's representative (*d*); that the employer or his agent is to have the right to reject improper or defective material (*e*).

16. **Effect of clauses providing that the work shall be done under the direction of the employer.**—Other still more striking illustrations of the extent to which the courts have gone in refusing to infer the existence of the relation of master and servant are to be found in those cases where it is not merely provided that the work shall be done under the general supervision of the employer or his agent, but that whole work, or certain parts thereof, shall be done "under the direction" of the employer or his agent (*a*). The rationale of these cases is, that the question whether the person employed was an independent contractor or a mere servant is not to be determined by the retention of a certain kind or degree of supervision by the employer, but by the contract as a whole—by its spirit and essence, and not by the phraseology of a single sentence or paragraph. If the result of applying this test is to render it reasonably certain that the intention of the parties was to enter into an independent contract, the words above specified will be construed as being one which relates to the results contemplated, and

(*d*) *Harding v. Boston* (1895) 163 Mass. 14, 39 N.E. 411; *Eldred v. Mackie* (1901) 178 Mass. 1, 59 N.E. 673; *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691; *Smith v. Milwaukee Builders' & T. Exchange* (1895) 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N.W. 1041.

The liability of the employer was denied, where the contractor had offered to do the work of excavation for "\$645, lump job," and the defendant had accepted the offer in a letter in which, among the other terms given, it was stated that "the excavation was to be done absolutely in accordance with the drawing," and "to the full satisfaction of the architect," and that the lines of the excavation were to be given by their engineer. *Hunt v. Vanderbilt* (1894) 115 N.C. 559, 20 S.E. 168.

For other cases in which similar stipulations were involved, see next section, notes (*c*), (*d*).

(*e*) *Hardaker v. Idle Dist. Council* (1896) 1 Q.B. 335, 353, 65 L.J.Q.B. N.S. 363, 74 L.T.N.S. 69, 44 Week. Rep. 323, 60 J.P. 196, (per Rigby, J., arguendo); *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Normalk Gaslight Co. v. Normalk* (1893) 63 Conn. 495, 28 Atl. 32; *Fitzpatrick v. Chicago & W. T. R. Co.* (1889) 31 Ill. App. 649.

(*a*) That there was at first a disposition on the part of judges to construe such a stipulation to the disadvantage of the employer may perhaps be inferred from some remarks of Lord Denman in *Allen v. Hayward* (1845) 7 Q.B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L.J.Q.B.N.S. 99, 10 Jur. 92. Referring to a provision of the contract which required that all such parts of the work as were not specified and described in the contract or plans and specifications should be executed in such manner as the surveyor of the works should direct, he said that this passage appeared to take power from the contractor, and keep it in the hands of the commissioners, or their surveyor. But it was held not to be applicable to the facts under discussion, and its actual effect was not determined.

not to the methods employed (b). This principle of interpretation has been deemed to warrant the inference that a contract is none the less independent in its character, because it contains one or other of the following provisions: That the work is to be done "under the direction and to the satisfaction" of the employer's representative (c); that the work to be performed "under the immediate direction and superintendence" of the employer's representative, and "to his entire satisfaction, approval, and acceptance" (d);

(b) For decisions embodying or recognizing this doctrine, see *Foster v. Chicago* (1902) 197 Ill. 264, 64 N.E. 322, affirming, (1901) 96 Ill. App. 4; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S.E. 1028; *Normalk Gaslight Co. v. Normalk* (1893) 63 Conn. 495, 28 Atl. 32; *Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776; and the cases cited on the following notes.

(c) *Kelly v. New York* (1854) 11 N.Y. 432; *Slater v. Mersereau* (1876) 64 N.Y. 138; *Frassi v. McDonald* (1898) 12 Cal. 400, 55 Pac. 139, 772; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N.E. 17, affirming (1897) 69 Ill. App. 659; *Foster v. Chicago* (1902) 197 Ill. 264, 64 N.E. 322; *Indiana Iron Co. v. Gray* (1897) 19 Ind. App. 565, 48 N.E. 803; *Ridgeway v. Downing Co.* (1900) 109 Ga. 591, 34 S.E. 1028.

Construing a contract which provided that the work was to be done "under the direction of the defendants and their architect, and to their entire satisfaction, approval, and acceptance," the court said: "It is manifest that this direction, approval and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it. . . . Appellant relied largely upon the use of the word 'discretion,' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give was to what should be done to accomplish the ends aimed at by the contract. He should not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts." *Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

A provision in a building contract, that the work shall be performed in accordance with the plans and drawings, and executed under the direction and to the satisfaction of the owner's architect, does not authorize the latter to modify the plans, so as to relieve the contractor from doing the work called for by the contract; and the owner cannot be held liable for injuries to an employé of a sub-contractor from the fall of the building during erection, owing to a change in the specifications by the architect. *Burke v. Ireland* (1898) 26 App. Div. 487, 50 N.Y. Supp. 369.

(d) *Foster v. Chicago* (1901) 96 Ill. App. 4, Affirmed in (1902) 197 Ill. 264, 64 N.E. 322. In an opinion, adopted by the Supreme Court as being a correct statement of principles, the Court of Appeals said: The court said: "The requirement that the time and manner of doing the work must be satisfactory to the city's commissioner of public works does not include the means employed, and is limited by the provisions of the contract. The direction and superintendence provided for do not relieve the contractor of responsibility, nor permit the city to change or modify the terms of the written instrument. The contractor agrees to do all work necessary to fully complete the sewer in the

that certain portions of the work are to be done "as directed" by the inspector or superintendent of the employer, and that the whole work is to be done "subject to the direction" of the superintendent at all times (*e*); that one designated portion of the work is to be done according to the plans, and "in accordance with the directions" of the employer's engineer, and another portion "under the immediate supervision and direction" of such engineer (*f*); that the employer shall have the right of superintending and supervising, by its agents, execution of work under a contract, and of giving directions in relation thereto (*g*); that the employer's agent is to "superintend the work, and give such instructions from time to time during the progress, as the necessities of the work shall demand" (*h*); that the employer's engineer may declare the contract forfeited "for non-compliance with his directions in regard to the manner of constructing" the railway in question (*i*); that the work is to be conformed to such further "directions" as shall be given by the employer's agent (*j*); that the materials and work

manner required by the contract as well as in a manner satisfactory to the city. Provided he reaches a satisfactory result in building such a sewer as the contract calls for, the contractor is not prevented from using his own methods. The specifications require the sides of a trench like that where the caving occurred 'to be effectually supported with suitable planks and timbers by the contractor without expense to the city.' The method of using planks and timbers for such purpose is left to the contractor. The contract does not include the direction, management and control by the city of every detail of the work. The contractor was not required to take his orders, day by day, from the city. He was to be guided by the contract and the specifications constituting a part thereof. He was not a mere servant and employé. He was an independent contractor, the city retaining such supervisory power as it might, from time to time, find it necessary to exercise to insure compliance with the contract and to obtain the result called for thereby."

(*e*) *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

(*f*) *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl., 32.

(*g*) *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N.Y. Supp. 7.

(*h*) *Robinson v. Webb* (1875) 11 Bush. 464.

(*i*) *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215. The trial judge, in an opinion adopted as correct by the Supreme court, said: "'Non-compliance with the directions of the engineer' must be construed in connection with other parts of the contract. It evidently means non-compliance with his directions in such matters as under the agreement he had the right to direct. It does not, either expressly or by inference, give him the right to interfere with the means Stark chose to use to accomplish the work. Such right is not reserved in the agreement, and it was not within the contemplation of the parties that the engineer could compel a forfeiture of the agreement by assuming at his will to give directions in matters over which the agreement did not give him jurisdiction."

(*j*) *Pack v. New York* (1853) 8 N.Y. 222. The court said: "This clause is nothing more than a stipulation for a change in the specifications of the work as stated in the contract at fixed prices provided therein. It does not, as the court

are to be furnished and done "according to the plan and under the direction and supervision" of the agent appointed by the owner (k); that the work shall be done "as described in the specifications and agreeably to the direction from time to time" of the employer's agent (l); that the work is to be done "in accordance with the plans and specifications and instructions furnished" by the employer "or such persons as he may appoint" (m); that the engineer in charge is to have power to prescribe the order in which the materials are to be placed, and that the work is to be done and materials furnished as directed by him (n); that the employer is to have the right of fixing the points to or from which the materials or articles handled by the contractor shall be conveyed, or the points at which such materials or articles are to be placed (o); that an

below held, make Riley [a sub-contractor] the immediate servant of the defendants or give to them any control over him as to the manner or otherwise in which he should conduct the blasting. The defendants may change the grade by new specifications from that provided in the contract, the duty is then imposed upon Foster to make his grade accordingly; but as to the manner in which he shall proceed in his blasting to make the grade, or do the work, he is as perfectly independent of the defendants, as a man ever was while engaged in doing his own work."

(k) *Allen v. Willard* (1868) 57 Pa. 374.

(l) *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461. The court said that, when the whole contract (see § 14, note (c), ante), was considered, it was quite clear that "the directions of the engineer or his assistants" thus referred to, were those only which were specially named in the specifications.

(m) *Hunt v. Pennsylvania R. Co.* (1866) 51 Pa. 475. The court held that the word 'instructions' used in the agreement referred to the kind of structure, design, materials, combinations, and all matters pertaining to the planning of the building to be erected, but that as to the mode of accomplishing the work which the contractor undertook, he was left to his own skill and judgment.

(n) *Cullan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

(o) In *Hughes v. Cincinnati & S.R. Co.* (1883) 39 Ohio St. 461, the court, in discussing paragraph (5) of the contract set out in § 14, note (a), ante, said: "The power of the engineer to direct, under this clause, is limited to cases where waste earth from an excavation is thrown out over the top slope of the excavation, into spoilbanks, and as to the manner in which such spoilbanks shall be made to slope backwards from the excavation. Conceding that the railway company would be liable for an injury from the mode and manner in which such spoilbanks might be constructed, under the direction, or without the direction of the engineer, it is not claimed that the plaintiff was so injured. In wasting the earth, which resulted in plaintiff's injury, the contractors were acting on their own responsibility without any control or right of control on the part of the engineer, as to the mode or manner of doing the work."

One employed, with his horse and cart, by a city to remove street scrapings, who is free from the control and direction of the city, except that he is directed where to load and where to unload, is not a servant of the city, so as to render it liable for injuries negligently inflicted by him upon a third person, while he is taking a load to the dumping ground. *Saunders v. Toronto* (1899) 26 Ont. App. Rep. 265, Rev'g (1898) 29 Ont. Rep. 273.

engineer who is to superintend construction work shall have the right to give directions as to the quantity of work to be done (*p*); that such work shall be conformed by the contractor to the lines and levels given by the employer's engineer (*q*); that the employer's agent shall have the power of fixing the times and places at which such work shall be prosecuted (*r*). The independence of the contract has been affirmed even in cases where it was specifically provided that the directions of the employer should be followed in respect to the manner or method in which the work was done, or the methods by which it was done (*s*).

Where a person enters into an absolute contract with a railway company to draw its cars, and furnishes the horses and drivers, and assumes the entire control, the fact that the company can direct what cars are to be hauled, and to what stations, does not disprove the independence of the contract. *Schular v. Hudson River R. Co.* (1862) 38 Barb. 653.

The fact that the owner of a store points out the goods to be carted, and their destination, to a man in the employ of a cartage company which is under contract to do all the cartage of the former at a specified price, does not show that the owner of the store exercised control over the manner in which the goods were to be transferred to the trucks, or over the route by which they were to be taken to their destination. *Riedel v. Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 509. To the same effect see *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513.

Where the contract between a telephone company and one K., provided that K. should furnish "all necessary labour, skill, material, apparatus, supplies, and machinery" to construct and complete the line, that the "telephones and switch board were to be installed, located, and placed as and where directed" by the telephone company, and that the work should be under the supervision of the company and its agent, it was held that K. was an independent contractor at least in respect to stringing the wires on the poles. *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N.W. 957.

Where it has been shown, in an action against A. for the negligence of B., that A. was working, under a contract, to haul sand at so much a load from B.'s lot, a witness cannot be asked by whose orders A. left off drawing sand from another lot of B., and whether B. could have directed A. to stop hauling from the lot in question. Such evidence had no tendency to show that the employer reserved control over the manner of doing the work. *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376. Reviewing (1881) 10 Mo. App. 61.

(*p*) *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

The fact that a sub-contract for the laying of a railway track contains a provision to the effect that the track is to be laid as far as it shall be ordered by the chief engineer of the general contractor does not render the general contractor liable for the negligence of the sub-contractor. *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S.W. 691.

(*q*) *Murphy v. Ottawa* (1887) 13 Ont. Rep. 334; *Harding v. Boston* (1895) 163 Mass. 14, 39 N.E. 411. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017.

(*r*) *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642 (see next note); *Foster v. Chicago* (1902) 197 Ill. 264, 64 N.E. 322, affirming (1901) 96 Ill. App. 4.

(*s*) In *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the contract contained this provision: "All work to be commenced and carried on at such times, and in

17. Effect of other clauses.—The following provisions, although they are expressive of the fact that the contractor was in some

such places, and in such manner as the engineer shall direct." The trial judge held that this stipulation created the relation of master and servant, this conclusion being based upon the remark made by Strong J. in *Painter v. Pittsburgh* (1863) 46 Pa. 213, to the effect that a certain clause there under review only gave the employer the "power to direct the *results* of the work, without any control over the *manner* of performing it, which control, alone, furnishes a ground for holding the master or principal for the act of a servant or agent." The supreme Court, however, said: "The word 'manner,' in the above quotation, is evidently considered as having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. 'Manner' must, in such case, mean the power to control the work, not only as to its character, but also as to the particular means used to accomplish it. This must needs be so, for as we have seen in the case of *Reed v. Allegheny* (1875) 79 Pa. 300, a stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. It is quite obvious that the word 'manner' must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution, but turning to the body of the contract, we find that grant was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed. So as to place; that is fixed between certain points on State street, and whilst the engineer might direct that the work should be done on either side or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some other street, or even beyond the points indicated on State street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed; that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something that is not found therein, he must then set an arbiter between the contracting parties, and fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This, in itself, exhibits two independent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun or during its progress is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully specified; the province of the engineer was to see that these means were properly applied, in other words to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract."

In *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa, 562, a contract for the grading of a railway provided that certain perishable materials in the right of way should be removed "as the engineer might direct." The court said: "The clearing of the ground was the work to be done, the end to be attained, and could be done in one of two modes at the option of the defendant. In the exercise of that opinion, burning was chosen as the mode of accomplishing the end. But with the manner of burning, defendant had nothing to do, and over it exercised no control. It could not direct that the combustible materials should be gathered in large or small heaps, or on one side of the roadway or the other, or that the act of burning should be prudently and carefully done, and proper precautions of watchfulness be exercised in order to prevent danger to the property of others, all relating to the manner of doing the work required by the contract to be done."

degree under the control of the employer, have also been held not to be inconsistent with the conclusion that the contract was an independent one: That a person undertaking contraction work in the streets of a city shall comply with the provisions of the municipal ordinances or by-laws relating to such work (*a*); that the employer shall have the power to "modify, alter or vary the works from time to time" (*b*); that the employer's representative is authorized to "change at his discretion the amount of all the various kinds of work and materials and structures" (*c*); that the employer shall have the right, at any time during the progress of the work, "to make any alterations, deviations, or omissions from the contract" (*d*); that without the consent of the employer or his supervising agent the contractor is not to sublet any part of the work (*e*); that, if the contractor shall at any time neglect or refuse to provide a sufficiency of materials and workmen to execute the work properly, the employer may himself furnish such materials and workmen, proceed with the execution of the work, and charge to the contractor the expenses thus incurred (*f*); that the employer shall have the right to demand and procure the discharge of any of the contractor's workmen who may be disobedient, unskilful, negligent, or in any other way unfit to participate in the work (*g*); that the employer shall have a right to object to

(*a*) Such a provision was treated as an immaterial element in *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Harding v. Boston* (1895) 163 Mass. 14, 39 N.E. 411 O.

(*b*) *Hardaker v. Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J. Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196.

(*c*) *Uppington v. New York* (1901) 165 N.Y. 222, 53 L.R.A. 550, 59 N.E. 91.

(*d*) *Frassi v. McDonald* (1898) 122 Cal. 400, 402, 55 Pac. 139, 772.

(*e*) *Robinson v. Webb* (1875) 11 Bush. 464; *Cuff v. Newark & N.Y.R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205.

(*f*) *Pioneer Fireproof Constr. R. Co. v. Hansen* (1898) 176 Ill. 100, 52 N.E. 17; *Wray v. Evans* (1875) 80 Pa. 102; *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461; *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215; *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059

(*g*) *Reedie v. London & N.W.R. Co.* (1849) 4 Exch. 254 6 Eng. Ry. & C. Cas. 184, 20 L.J., Exch. N.S. 65 (where Rolfe, B., remarked that, in spite of such a stipulation, the workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal, if they thought him careless or unskillful, did not make him their servant): *Hardaker v. Idle Dist. Council* (1896) 1 Q.B. 335, 35 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196; *Atlantic Transp. Co. v. Coneys* (1897) 28 C.C.A. 388; 51 H.S. App. 570, 82 Fed. 177; *Callan v. Bull* (1896) 113 Cal. 593; 45 Pac. 1017; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495; 23 Atl. 32; *Bayer v. Chicago*

the employment of any particular person by the contractor, if there is reason to suppose that such a person would not be suitable (*h*); that the contractor is not to employ as his workmen any persons except those resident in a specified locality (*i*).

18. Reservation of a full power of control, effect of.—Generally— Since the rationale of the doctrine by which an employer is exempted from liability for the torts of an independent contractor is that, *ex hypothesi*, the latter is not under the control of the former with respect to the execution of the details of the stipulated work, it is clear that this doctrine is not applicable in cases where, as a matter of fact, the situation thus supposed does not exist. If the employer has reserved the right of exercising control, the person employed is in law regarded as a servant, even though his calling may be for some purposes independent (*a*).

M. & N.R. Co. (1896) 68 Ill. App. 219; *Blumb v. Kansas* (1884) 84 Mo. 112, 54 Am. Rep. 87; *McKinley v. Chicago S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91; *Schular v. Hudson River R. Co.* (1862) 38 Barb. 653; *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205; *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S. E. 1059.

In one case it was remarked that the fact that the discharge is to be accomplished through a request to the immediate employer of the workman, instead of by the direct act of the principal himself, rather repels than creates the inference that the principal possessed the right to discharge. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103.

In another case, when commenting upon a provision by which that the contractor was required to dismiss, from his employment, all incompetent or unfaithful persons, the court said: "In this we may observe, that the statement, that the city had a general power over the men employed by the contractor, is too broad, for the contract is, that he shall dismiss, from his employment, incompetent or unfaithful employes. Herein the fact of his superior and independent control over the workmen is recognized: for if the city retained this power, why contract with Grant for the doing of that which it could, at any time, do itself." *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642.

(*h*) *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 102.

(*i*) A municipal corporation which requires a person to employ only its own citizens, does not thereby deprive him of the character of independent contractor, so as to render itself liable for the acts of his employes. *Harding v. Boston* (1895) 163 Mass. 14, 39 N. E. 411.

(*a*) "Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent." *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

"The terms 'independent contractor' and 'servant' as applied to the subject in hand, are somewhat unsatisfactory, but are used for want of better ones. The word 'servant, as used in this connection, is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong. In every case the decisive question in determining whether the

doctrine of respondeat superior applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong. If he had, he is liable. On this question the contract under which the work was done must speak conclusively in every case, reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the 'servant' of the defendant, in the popular sense of that word, or a person merely employed to do a specified job or piece of work." *Rait v. New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N.W. 729.

In a case where plaintiff's counsel contended that the circumstances brought it within an alleged exception to the general rule, viz., "That the employer is liable where he does not release the entire charge of the work to the contractor, but retains supervision of its construction," the court observed: "This is nothing more than saying that, where the contractor is not an independent contractor, but is under the control of his employer, the employer is liable. In other words, instead of its being an exception to the admitted doctrine above, it seems to be nothing more than stating it in different phraseology. Or rather, while recognizing the doctrine, it states a certain condition where the employé would not be an independent contractor, to wit., where the employer had not released the entire charge of the work to him." *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

"The element essential to the discharge of the contractee from responsibility is that he shall not reserve control over the work." *Farren v. Sellers* (1887) 39 La. Ann. 1011, 3 So. 363, 4 Am. St. Rep. 256.

"The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work." *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

"If the employé had 'the right to control the conduct of the wrongdoer' . . . either as to the time, place or matter of doing the act, he cannot absolve himself from liability for the negligence of the wrongdoer on the ground of independent relation, even though such a wrongdoer was a competent and fit person to do the work, and was acting under a contract to do the specific act, and not as an ordinary employé." *Corrigan v. Elsinger* (1900) 81 Minn. 42, 83 N.W. 492.

"It may be regarded as settled that, if the employer keeps control of the mode of the work, his liability for the acts of a contractor and servant is the same." *Reynolds v. Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

The employer may be held liable for injuries inflicted, where, although the work has been let to an independent contractor, he has "retained control of the manner of doing it, so that he has the right to give directions as to the steps which shall be taken to produce the result." In that case, as the employer "has control of the acts done by the contractor and may prevent any negligence on his part," he is held to be liable for any negligence which contractor is guilty of, because he has not prevented it. *White v. New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454.

The following instruction has been given: "If you find that the defendant reserved the control of the place of the excavation, or the control of the person employed, or the right to direct him in the construction of the work, or did control him or direct him in the doing of the work, then he was the mere agent or servant of the defendant, and, it would be, liable for his negligence and carelessness, the same as if the defendant did it itself." *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

In a recent case before the English Court of Appeal the finding of the trial judge to the effect that the plumber whose negligence caused the injury was not an independent contractor, but that he acted under the supervision of the defendants who retrained the control of the work was held to be fatal to the defendants. *Holliday v. National Teleph. Co.* [1899] 2 Q. B. 392, 608 L.J.Q.B.N.S. 1016, 81 L.T.N.S. 252, 47 Weekl. Rep. 658.

For other explicit recognition of the doctrine, that, unless the employer relinquishes control over the work, the person employed is his agent or servant, see *Wilson v. White* (1883) 71 Ga. 506, 51 Am. Rep. 269; *Edmundson v. Pittsburgh M. & Y. & R. Co.* (1885) 111 Pa. 316, 2 Atl. 404; *Morgan v. Bowman* (1856) 22

If, in respect to one particular portion of the work the person employed is subjected by the terms of the agreement to the control of the employer, the necessary inference is that the employer acts as a master in exercising the power so reserved (*b*).

The intendment is that the plaintiff is seeking to recover on the ground of the existence of a contract of service, where he alleges in his declaration that the negligent person was working "under the direction" of the defendant (*c*); or "under the superintendence, control, management, and direction" of such defendant (*d*).

19. Independence of contractor when negatived by the specific terms of the contract.—In the note below are collected a large number of cases in which the phraseology used by the parties to the agreement was held to preclude the reference that the person employed was an independent contractor. Upon a comparison of

Mo. 538; *Veasie v. Penobscot Co.* (1860) 49 Me. 119, and many of the cases cited in the succeeding sections.

In one case it was said to be "an important test of liability, that the employer reserves the power not only to direct what shall be done but how it shall be done." *New Orleans M. & C.R. Co. v. Hanning* (1872) 15 Wall 649, 657, 21 Led. 220, 223. But the authorities show very plainly that this is not merely an "important," but the conclusive test.

(*b*) The reservation by a railway company in a contract for the construction of its road, of the right to designate the points at which crossings shall be put in on public or private roads, the contractors having no right to even close up a road until it has been passed upon by the company's engineer, makes it responsible for injuries to the travelling public from the improper construction of a crossing designated by it in the exercise of its reserved power. *Dublin v Taylor B. & H. R. Co.* (1899) 92 Tex. 535, 50 S.W. 120. The Court remarked: "While it is true that a reservation of control over that part of the work would not alone make the railway company liable as master for the whole work, yet in respect to crossings at intersections of all roads it acted as master in exercising the reserved powers, and will be held responsible for the consequences." By the decision on the former appeal (sub nom. *Taylor B. & H. R. Co. v. Warner* (1895) 88 Tex. 642, 32 S.W. 868) the company's liability was put upon the ground of a breach of a non-delegable duty. See § 57, note (*a*), post. A later appeal before the Court of Civil Appeals is reported in *Taylor B. & H. R. Co. v. Warner* (1900; Tex. Civ. App.) 60 S.W. 442.

(*c*) *Mann v. O'Sullivan* (1899) 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375.

(*d*) *Hunt v. Vanderbilt* (1894) 115 N.C. 559, 20 S.C. 168. Discussing the consequence of ascribing this meaning to the complaint, the court said: "This language is so used that it distinctly qualifies and controls any matter alleged in the nature of inducement or explanation, which sometimes, under the very liberal construction of code pleading, is held sufficient to avoid a variance, and it clearly imports that the defendant is sued for the conduct of Britt, as the defendant's servant, and not otherwise. The testimony discloses that Britt was not the servant of the defendant, but an independent contractor, and as the principles of law upon which the defendant may be liable for the conduct of Britt in these distinct capacities are, in some very essential particulars, widely different, and really constitute different causes of action, we have but little hesitation in deciding that the evidence fails to sustain the cause of action set forth in the complaint."

the provisions which have received such a construction with those which are reviewed in §§ 13-16, it seems impossible to avoid the conclusion that there is, in not a few instances, an essential conflict of judicial opinion respecting the extent to which an employer is entitled to retain the power of directing the work without subjecting himself to the duties and liabilities of a master (a).

(a) (1) *Work on railroads.*—In *New Orleans M. C. & R. Co. v. Hanning* (1872) 15 Wall. 649, 21 L. ed. 220, the agreement was that the person employed should furnish the timber, etc., necessary for the rebuilding of the defendant's wharf with such mooring-posts, cluster piles, etc., "as the company, through their engineer, might require;" that the engineer "should supervise and direct the work," and that the work "should be done to his satisfaction;" that the old wharf should be "made as good as new, and the new wharf in the best workman-like manner." The defendant railway company was held to be liable for the negligence of the person employed, the argument of the court being as follows: "The company do not yield to Carvin [the contractor] the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips, and inclines, paying according to the number of square feet covered. They are at liberty to direct such material shall be used and how it shall be laid to make the old wharf as good as new, and to make the new the best workmanship. They are to supervise the work to be done. They are to direct how it shall be done. This includes the power of controlling and managing the entire performance of the work, within the general limits mentioned. . . . Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires, a great amount of care and direction of the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done but how it shall be done. This is an important test of liability." This ruling is not easy to reconcile with the general trend of opinion which is evidenced by the decisions cited in §§ 14-17, ante.

Those decisions are still more distinctly in conflict with an intimation in another case, that a contract by which a railroad company employed a contracting company to do certain blasting at the top of a cut at the end of a tunnel did not of itself show that the contracting company was an independent contractor, as the terms of the contract, (not stated in the report), showed that the railroad company reserved the right to determine the extent of the excavation to be made, and undertook to furnish a locomotive and train crew to transport the material removed. *Louisville & N. R. Co. v. Tow* (1901) 23 Ky. L. Rep. 408, 63 S.W. 27.

The defendant railroad company made a contract with one M., by which he was to take entire charge and control of defendant's freight business at the St. Louis station, load and unload cars, switch them back and forwards in the yard, make up freight trains, and do all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for the defendant; to prepare, execute, and receive all necessary freight bills; to keep all necessary books of account, collect freight money, and generally act as and discharge all the duties of a station agent. To enable him properly to discharge his duties he was to have control over the grounds, yards, and buildings, engines and cars of defendant at the station. Defendant was to

furnish the necessary engines and keep them in repair and supplied with fuel, etc., and to employ the engineers and firemen who were to be under M.'s control and were to be paid by him. For his services M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered and fifty cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and if not so done defendant could revoke the contract on twenty-four hours' notice. M. performed no service for any other person than defendant. In an action against the defendant for injuries received through the negligence of trainmen in the employ of A., it was held that A. was the servant of defendant, and not an independent contractor. *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303.

The independence of a contract is destroyed by a stipulation that the work is to be done "according to the plans and directions of the chief engineer of said company," who is "to be employed and paid by the company." *Veasie v. Penobscot Co.* (1860) 49 Me. 119.

Where it was stipulated that in an agreement between a railway company and a contractor, that certain passenger trains operated by the latter were to be "run under the direction of the company, and under their control," the company was held liable for the value of a horse which was run over by a train. *Wyman v. Penobscot & K. R. Co.* (1858) 46 Me. 162.

(2) *Construction of buildings.*—In a case where a workman employed by the agent of one M. was injured by a defective appliance the question to be determined was, whether M. was or was not the agent of the defendant, by virtue of a certain contract for the construction of several buildings. This contract contained some provisions which are not common in contracts of agency. It required him to make all contracts for material and labour in his own name, and made him responsible under such contracts, in the first instance, to the persons with whom he should contract. It also authorized the defendant company to retain from sums which should become due for labour and material \$40,000, for which M. was to accept capital stock of the company. To that extent, therefore, he might be regarded as having advanced his own money for the payment of labour and material. On the other hand, the agreement recited that the company was about to construct business blocks in Sioux City, and desired to employ M. in their construction, as therein stated. It provided for the letting of contracts for all necessary work and material, excepting the carpentry work and material, to the lowest bidder, subject to the approval of the company, and required M. to furnish the material and labour necessary for the woodwork. He was required to superintend the entire construction of the buildings, and to examine and supervise the material furnished, and to give his exclusive attention to those subjects. He was to furnish to the company with a statement of the actual cost of all work and material, and the company reserved the right to approve all contracts he should enter into, and to make changes in the building. In consideration of the performance of the agreement on his part M. was to receive 10 per cent. of the cost of certain labour and material, "in full for all his services in looking after the execution of said contracts for material and labour and superintending the entire construction of said buildings." The court said: An examination of the entire agreement leads us to the conclusion that, for the purposes of this case, M. must be regarded as an agent of the company. It may be claimed that as to the carpentry work he was an original contractor, but the contract, considered as an entirety, shows that his work, in addition to letting contracts and providing materials, was of a supervisory character. . . . He was not required to work as a carpenter, but was obliged to furnish material and labour for the woodwork. He was not allowed a separate sum for that labour and material, but the actual cost of it was to be paid by the company, which reserved "the right to determine the prices to be paid for all material and labour for said buildings." The contract gave to the company not only the right to fix prices, but also the right to approve the labour done and material furnished, and Mainland was subject to its direction and control in all things." *Hughbanks v. Boston Invest. Co.* (1894) 92 Iowa, 267, 60 N. W. 640.

Commenting upon the words of an instruction (not stated), in a case where the existence of a contract of service was held to have been properly inferred, the court said: "Here, although Daegling was erecting the walls under a contract, .

he was, by its terms, to carry forward the work under the control of the superintendent, and 'to remove all improper work or materials upon being directed so to do by the superintendent,' to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize. The owner also reserved the right to change his plan, and the architect was declared to be the superintendent for the owner." *Schwartz v. Gilmore* (1867) 45 Ill. 455, 92 Am. Dec. 227.

(3) *Demolition of Buildings*.—In a charge to a jury which was held by a Supreme Court to be a correct statement of principles, the trial judge thus commented on a contract which provided in substance that one Elston was to take down the entire building, or so much thereof as the employer might request, and that all of the work was to be done carefully, and under the direction and subject to the approval of the employer: "This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so to mean that he, by this contract, was subject to their orders as to the time, and manner and mode of doing this work; and that they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as Elston and the defendants are concerned." *Linnehan v. Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287.

A written contract to demolish a building, containing a clause that "the work is to be done according to the direction of the supervising architect, whose decisions on all points shall be final," creates the relation of master and servant. *Faren v. Sellers* (1887) 39 La. Ann. 1011, 4 Am. St. Report 256, 3 So. 363 (workman injured). The Court said: "The nature of the work was such that nothing else but the method of doing it required the supervision of the architect . . . If the architect had directed or permitted Lynch to strip the building as actually done by defendants, before removing the spans, Lynch would have been the servants of the defendants, quoad the adoption of this method, and they would have been responsible for any injury resulting therefrom. A fortiori are they responsible when they themselves adopt this method and do this part of the work themselves. . . . It is perfectly clear that the stripping of the building by the removal of the purlines and braces was an essential part of the work covered by the contract; that the time, order and manner of their removal formed important elements in the method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty and dangerous method, and if the injury to Faren happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract."

(4) *Street Improvements*.—A provision in a contract, entered into with a district council for the levelling and paving of a road, to the effect that the contractor shall execute all the works mentioned in the specifications and certain plans, according to such explanatory drawings and instructions as may be furnished to him by the district council's surveyor, gives the district council complete control over the work and the manner of its performance, and it is responsible for personal injuries caused by the negligence of the contractor in performing his contract. *Penny v. Wimbledon Urban Dist. Council* [1898] 2 Q.B. 212, 67 L.J.Q.B. N.S. 754, 78 L.T.N.S. 748.

"The city of Cincinnati having given a contract to a person to regrade and repave a street, and provided in the contract for the work to be 'done under the direction' of the city civil engineer, or agent appointed by the city council for the same, who should have 'entire control over the manner of doing and shaping all or any part of the same,' and whose 'directions were to be strictly obeyed,' etc., the contractor carelessly and improperly left piles of stones and materials for the work at a place near or about the gutter of the street, where a nuisance was likely to be created, the results being that, when rain fell, the water was obstructed, and flowed back and spread over the premises and building of the

complainant.—Held, that the city was liable for the damage so caused. *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

That a contract for putting in a sewer was an independent one was denied in a case where it contained the following provision: "The word 'engineer' as herein employed, shall be construed to mean such person, as shall be designated by the city council, whose duty it shall be to superintend the work in all its details, pass upon, and reject such material as may not be in conformity with these specifications, designate when work shall begin, and how it shall be conducted, discharge incompetent, or disobedient employes, and pass upon all questions as to the intent and meaning of these specifications. The engineer subject to approval of the sewer committee, may appoint, and place upon the work such inspectors as he may see fit, fully authorized to act for him in his absence." *Scott v. Springfield* (1899) 81 Mo. App. 312.

By an agreement for the construction of a sewer the contractor undertook to perform the work, 'under the direction' of the defendant corporation's street commissioner and a surveyor. In executing the contract, he negligently caused the excavated earth to be piled on the side-walk, over the plaintiff's vault, and the arch of the vault was broken down by the weight of the superincumbent mass, and the plaintiff's property contained in the vault was destroyed. The court was of opinion that the contractor was the agent of the corporation in building the sewer, and that a nonsuit had been erroneously directed. *Delmonico v. New York* (1848) 1 Sandf. 222.

In a case where an overflow resulted from an obstruction created by the earth which had been thrown out of a trench dug by a contractor for a pipe sewer, the retention by the defendant municipality of a supervisory control over the work was held to be a necessary inference, where a power had been reserved to make alterations in the manner, extent and plan of the work, as it progressed, and to relet the work in case the terms of the contract were not complied with, and among other reservations of authority and control over the work was the following: "The contractor shall commence the work at such points as the engineer and sewer committee may direct, and shall conform to their directions as to the order of time in which the different parts of the work shall be done, as well as to all the engineer's other instructions as to the mode of doing the same, including the length of street or alley that may be taken up in advance of the back filling." *Denver v. Rhodes* (1886) 9 Colo. 554, 568, 13 Pac. 729.

In *Nashville v. Brown* (1871) 9 Heisk. 1, 24 Am. Rep. 289, the Court seems to have considered that the fact of its having been provided by a contract for certain street work, that it was to be done "under the direction of the city engineer, and to the satisfaction of the street committee" was an element which in itself showed that the relation created was that of master and servant. But the main ground of the decision was the rule which declares the keeping of a street in a safe condition to be a non-delegable duty. See §§ 58, 59, post.

(5) *Construction of canals.* From provisions of a contract which showed that the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work, and that the dismissals of the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract, the Court drew the inference that there was "dependence" and "serviency" in the contractors. *Chicago v. Joney* (1871) 60 Ill. 383 (obstruction created while the canal was being deepened caused an injury to a person using it).

(6) *Laying of pipe lines.* A contractor is not deemed to have full control of the work of excavating a trench for a pipe line across a highway, where the agreement provides that if the work is not done in a manner satisfactory to the superintendent of the contractee, he may put men in the trench at the expense of the contractor to make the necessary change; and also that, if the contractor fails to prosecute the work with due diligence, the contractee may finish the same and charge it to the contractor. *Washington Natural Gas Co. v. Wilkinson* (1886 15; Pa.) 1 Cent. Rep. 637, 2 Atl. 338.

Where the contract for laying a line of pipes provided that they "were to be deposited in such continuous lines as might be pointed out, in such manner as not to interfere with the traffic, and to the satisfaction of the officer who might be present," and the plaintiff was injured by falling over a pipe which had been deposited by a carter in such a manner as to project over a crossing, one of the

judges was of opinion that the public board which had made the contract for the distribution of this and other pipes along the highway had retained a discretionary power to indicate by the direction of their officer, the places at which the pipes were to be deposited. *O'Brien v. Board of Land & Works* (1880) 6 Vic.L.R.(L.) 204, 2 Australian Law Times 22.

(7) *Work in mines.*—A contract of service is established where the undisputed evidence of the plaintiff's father, who made the contract, is that he hired the plaintiff to work in the mines for the appellant; that the contract between him and the appellant was, that his two sons, including plaintiff, were to cut coal for 42½ cents per ton for all the coal they could dig; that he (the father) was to furnish the tools and powder and stuff; and that the bank boss was to have control of the work. *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442 (where the question was, whether the plaintiff was entitled to sue, as a servant, under the Employers' Liability Act of Alabama).

Mine owners are responsible for the safety of the mine, not only to the servants directly hired by them, but to the servants of contractors, who have practically no discretion as to the planning of the mine, or the selection of their working ground, and who are employed merely for the purpose of stripping a lode of its ore, the mine-owners reserving the power of determining when and where dangerous rock shall be removed, and of giving directions as to where supporting pillars shall be left, and timbers shall be placed to prop the walls. *Lake Superior Iron Co. v. Erickson* (1878) 39 Mich. 492, 33 Am. Rep. 423.

(8) *Scavenging work.*—A man employed by the Police Commissioners of a town to remove rubbish was held to be a servant, not an independent contractor, where the contract contained provisions to the following effect: "(1) That certain specified drains should be swept as often as required by the inspector; (2) that the commissioners should be entitled, as occasion might arise, to require the use of an additional cart or carts; (3) that the contractor should be bound to remove any nuisance upon receiving written orders from the commissioners; (4) that the work should be performed to the entire satisfaction of the commissioners or their inspector; and (5) that the contractor should be under the immediate order of the inspector or, in his absence, of the clerk of the commissioners. *Stephens v. Thurso Police Comm'rs* (1876) 3 Sc. Sess. Cas. 4th Series 542 (plaintiff held entitled to recover for injuries caused by stumbling over a heap of rubbish left in a street without a light).

(9) *Work in manufacturing establishments.*—In a case where the question was, whether the jury were justified in finding that the negligent person was the agent or servant of defendants, it appeared by the uncontradicted evidence that one S. took the work of which he had charge by the piece. Defendants paid him a fixed price for a specified amount of work, and he hired the other employes under him, paid them himself, and retained the profits or suffered the losses which were the difference between the fixed contract price which he received and the amount of wages which he paid. He carried on his operations in one room of the defendant's factory. They furnished him the machinery, the power and the material, and the defendant testified on cross-examination, that his superintendent had a right to direct him when things should be done, and how they should be done, and that, if the employe did not obey orders, he could be discharged. The court held that, while the undisputed evidence showed that S. was to some extent a contractor, yet the jury were justified in finding, from the whole evidence, that he was not so far an independent contractor that defendants were exempt from liability for his acts. *Barg v. Bousfield* (1896) 65 Minn. 355, 68 N.W. 45.

Whether one who is supervising a department of a factory is a servant of the owner or an independent contractor, is a question for the jury, where he testifies that he was paid by the gross for articles turned out of his department, and paid his subordinate out of the sum thus received, but also states that he was only the foreman for that department, and under the superintendent. *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N.Y. Supp. 99.

It is proper to refuse a charge framed on the hypothesis that there was no evidence tending to show that the negligent person was the defendant's servant, where there is testimony to the effect that that person had contracted to bale hulls of cotton seed at a specified price per bale, using the machinery and power of the defendant; that the defendant employed and paid the hands assisting in

the work ; that the negligent person was a negro, who had no other occupation, and was irresponsible financially ; that he considered himself to be a foreman, and not an independent contractor ; and that the company, by its superintendent and other officers, did actually exercise authority and control over him, over the machinery, and over the hands employed by him, to a degree inconsistent with the supposition that his work was under his control. *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399, affirming in part and reversing in part (1897) 38 S.W. (Tex. Civ. App.) 1137.

(10) *Sale of commodities.*—The provisions of a contract with a person employed to solicit orders for a commodity, and the reasons for the conclusion arrived at, were thus stated in a decision by the Supreme Court of the United States: "The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled 'Canvasser's Salary and Commission Contract.' The compensation to be paid by the company to Corbett, for selling its machines, consisting of 'a selling commission' on the price of machines sold by him, and a 'collecting commission' on the sums collected of the purchasers, is uniform, and repeatedly spoken of as made for his 'services.' The company may discharge him by terminating his contract at any time, whereas he can terminate it only upon ten day's notice. The company is to furnish him with a waggon ; and the horse and harness to be furnished by him are 'to be used exclusively, in canvassing for the sale of said machines and the general prosecution of said business.' But what is more significant, Corbett 'agrees to give his exclusive time and best energies to said business,' and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished him by the company ; and he further 'agrees to employ himself under the direction of the said Singer Mfg. Co. and under such rules and instructions as it or its manager at Minneapolis shall prescribe.' In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company ; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it ; and might, if he saw fit, instruct him what route to take, or even at what speed to drive. The provisions of the contract, that Corbett shall not use the name of the company in any manner, whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment." *Singer Mfg. Co. v. Kahn* (1899), 132 U.S. 523, 33 L. ed. 442, 10 Sup. Ct. Rep. 175.

In *Gahagan v. Aermotor Co.* (1897) 67 Minn. 252, 69 N.W. 914, the first paragraph of the contract was as follows: "Said sale agent agrees as follows: 1st. To do all the business pertaining to selling aermotors, . . . to receive all goods shipped to him under this agreement, to pay freight and expressage on such goods from Chicago, and to keep them well housed and in good order until sold, free of taxes and all charges to said company, and to be governed by the printed instruction on the back of this contract, which are hereby referred to and made part of this contract, and the instructions of the Aermotor Company." Commenting upon this contract the court said: "Many of its provisions tend to indicate that its object was to constitute Frankson a factor to sell on commission, upon the terms and subject to the conditions and limitations therein specified, but otherwise to leave him to carry on the business in his own way, free from any right of control or direction on the part of the defendant. But the last clause of the first paragraph will not reasonably admit of any other construction than that Frankson was to be governed by any instructions which the defendant might give as to the manner in which the business should be conducted,—in other words, that under this contract of employment the defendant had a right to direct the action of Frankson by any instructions it might give as to the manner in which he should conduct the business, not inconsistent, of course with the express terms of the contract itself. If this was so, then defendant had the right to control and direct his acts as to the manner in which the mills should be advertised, as, for example, setting up samples to attract public attention to them. . . . If the defendant had, under its contract with Frankson, the right to control his action in the matter of setting up sample mills, then it is liable for his negligence. Under the evidence this was a question for the jury." It was accordingly held that damages might be recovered for injuries received by a child who meddled

20. —by the provisions of a statute applicable to the circumstances.—If the contract has been framed with reference to the express provisions of a statute which regulates the manner in which the work in question is to be carried out, those provisions become an implied term of the contract, and if they declare that the contractor is to be under the control of the contractee or his representative, the relation created will be that of master and servant. This situation is illustrated by several cases dealing with contracts in which the clauses of a city charter determine the extent of the supervisory powers reserved (a).

with a sample wind-mill which had been set up in a street, and set in motion by the wind.

The persons whom it was sought to hold liable were wholesale dealers in millinery, and had in their service as a salesman and traveling agent one Wright, who was hired by the year on a salary. Wright's duties required him to stay in the store, or travel, soliciting orders for goods and making collections, as his employers might direct. When in the store, he paid his own board; when travelling his expenses were allowed to him, and paid by his employers. At the time of the transaction in controversy he was travelling in the course of his employment; but he had no particular instructions, nor was he under any orders as to the route or mode of travel he should adopt. Commenting upon this evidence, the court said: "In the present case Wright, in respect to his employment, was at all times subject to the will of his employers, and could not, consistently with his duty to them, refuse to obey their directions in the performance of the service for which he was engaged. It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties. We think Wright was a mere servant or agent, and cannot be regarded as a contractor within the meaning of the cases bearing on the subject. . . . His contract of employment did not bind him to produce any given result. His time belonged to his employers, and he was entitled to be paid irrespective of results." *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55 [plaintiff's buggy and horses were injured by the negligence of Wright].

(a) The independence of a contract with a city for the building of a sewer was held to be negatived, where the contract was let pursuant to the provisions of a statute, by virtue of which the Board of Public Works had full and complete control of the manner of the performance of the work by the contractor, during the progress thereof, and it was the duty of that board to reserve, in the contract for building the sewer, the right to determine finally all questions as to the proper performance thereof, or the doing of the work therein specified, and in case of imperfect or improper performance, to suspend the work, to order a re-construction thereof, or to re-let the work to some other party. (Wis. Private & Local Laws, 1869, chap. 399, §§ 11, 17, chap. 401, § 12.) *Harper v. Milwaukee* (1872) 30 Wis. 365 (earth dug from a trench was left in such a position that the water in a drain was obstructed and diverted on to the plaintiff's premises). *Kollock v. Madison* (1893) 84 Wis. 459, 54 N.W. 725. In the first cited case the court, not having the contract before it, entertained the presumption that it was made in accordance with the requirements of the statute.

The charter of the City of Seattle which was in force at the time when the contract in question was entered into conferred upon the board of public works the management and control of public streets and alleys of the city; also the superintendence of streets, the making of the improvements therein, and the management, building and repairing of all sewers and connections therewith. It further provided that such improvements as were made by contractors should

21. —by direct evidence that the employer exercised control over the work.—In estimating the proper import of the testimony submitted, the essential question to be determined is, not whether the employer actually exercise control over the details of the work, but whether he had a right to exercise such control (a). Clearly,

be made under the *management* of the board of public works. The contract and specifications in the case under consideration contained these provisions, among others: (1) That the improvement should be under the superintendence of the city engineer, and any orders and directions given by him or his duly appointed representative should be respected and immediately and strictly obeyed by the contractor or any overseer of the work; (2) that, whenever the contractor was not present on the work, orders would be given to the superintendent or overseer who might have immediate charge thereof, and should by them be received and strictly obeyed; (3) that, if any person employed on the work should refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or should appear to be incompetent, disorderly or unfaithful, he should upon the requisition of the engineer, be at once discharged and not again employed upon any part of the work. It was held that, under the provisions of this contract, the persons employed were practically placed to work under the control, direction and management of its engineer, and therefore were not independent contractors within the meaning of the rule which exempts a city or other employer from liability for an injury caused by negligence in the prosecution of the work. *Cooper v. Seattle* (1897) 16 Wash. 462, 58 Am. St. Rep. 46, 47 Pac. 887 (water-main burst in consequence of the manner in which an excavation was made around it). To the same effect, see *Smith v. Seattle* (1899) 20 Wash. 613, 56 Pac. 389 (grading caused removal of lateral support); *Seattle v. Busby* (1880) 2 Wash. Terr. 25, 3 Pac. 180 (similar facts).

The intention of the legislature that the city of St. Paul should "retain that supervisory and directory power over the details of the work and the manner of its performance which is so valuable to the citizen in protecting his person and property against the carelessness of irresponsible contractors," was held to be a necessary inference, for the reason that the charter provided as follows: "The said street commissioners shall have power to order and contract for the making, grading, repairing and cleansing of streets, alleys, public ground, reservoirs, gutters and sewers within their respective wards, and to direct and control the persons employed therein." *St. Paul v. Seitz* (1859) 3 Minn. 297, 74 Am. Dec. 753, Gil. 205 (plaintiff fell into an excavation made in the course of the grading of a street).

(a) "It is this unlimited right of control, whether actually exercised or not, which, in my opinion, is the condition for inferring the responsibility of a master." *Hardaker v. Idle Dist Council* [1896] 1 Q.B. 335, 353, 65 L.J.Q.B.N.S. 363, 74 L.S.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196, per Rigby, L.J.

"The tendency of modern decisions is . . . not to regard as an essential or absolute test so much what the owner actually did when the work was being done as what he had a right to do." *Atlantic Transp Co. v. Coneys* (1897) 28 C.C.A. 388, 51 U.S. App. 570, 82 Fed. 177, where it was held that a carpenter, engaged in repairing the fittings of a steamer for cattle and freight, is not an independent contractor, where the captain and superintendent have the right to direct the extent and manner of the alterations and repairs, although such right is not often exercised because of the confidence in the ability of such carpenter and his knowledge of what will be required, and separate bills are made out for the separate kinds of work upon each vessel and the materials furnished for each job.

In another case it was laid down that, in order to constitute the employé a servant, "it was not necessary that his employers should, in fact, exercise such control," and that, "if they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties." *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55.

however, evidence which shows that the employer did, as a matter of fact, interfere with or give directions regarding the work must necessarily have a material bearing upon the question of his liability. Such evidence is susceptible of two constructions, according to circumstances.

(1) It may be regarded as tending to establish either the general conclusion, that the employer had reserved the right to control all the details of the work, and consequently occupied the position of a master in regard to the person employed. To negative the inference that the person employed was an independent contractor, it is not necessary, in this point of view, that the directions actually given should have embraced every detail in the execution of the work (b).

(2) It may be regarded as tending to establish the special conclusion, appropriate only to cases in which the injury was the direct result of the employer's interference or directions, that he was a principal tortfeasor, and responsible as such, whatever may have been the character of the contract, as a whole.

The second of these aspects of the evidence will be considered in § 73, post. That the former aspect is illustrated by most, if not all, of the decisions cited in the note below, would seem to be a reasonable inference from facts involved and the language used in

In another case it was remarked that, while defendants might not have exercised power of control over the work of the alleged contractor, yet if they retain the right to exercise such power during the progress of the work, then he was their servant, and not their contractor. *Goldman v. Mason* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337.

In a charge by a trial judge, which was approved by the court of review as being a correct statement of principles, the following remarks were made with reference to the evidence which had been introduced as to the actual control which the employers exercised over the work: "That is all proper and competent evidence for you in considering the matter, yet the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in this case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power of control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly." *Linnehan v. Rollins* (1884) 137 Mass. 123, 50 Am. Rep. 287.

The same doctrine is explicitly recognized in *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32; *Hawke v. Brown* (1898) 28 App. Div. 37, 50 N.Y. Supp. 1032.

(b) *Sullivan v. Dunham* (1898) 35 App. Div. 342, 54 N.Y. Supp. 962.

the opinions. But in some instances there may be a doubt as to the precise standpoint of the Court (c).

(c) (1) *Work on railways.*—In one case the court thus commented on the evidence which, in its opinion, negatived the contention of the defendant, that the labourers whose carelessness produced the injury were independent contractors: "The proof shows that these graders were employed directly by the railroad company and were paid by the company at the rate of so much per cubic yard of earth removed, and an agreed price for all stumps removed. The graders were common labourers, and the defendant company seems to have been carrying on the general work of constructing its road within itself, and not, as is often customary, through the instrumentality of an independent contractor for the various branches of its work. Its witness, C. R. Knight, who was its engineer, as he says, 'in charge' of the extension of the road to Palatka, undertakes in his evidence to represent these graders as being independent contractors; but he testified that their work was staked out for them by the engineer in sections, and the 'yardage' computed, and that then a 'foreman' let out the sections to those who applied for the grading of them; and that the next duty of the foreman was to accept or reject the work upon its completion, and in case of doubt as to whether the work was well done, he called on the engineer for the levels necessary to determine the doubt as to whether the grader has 'properly and faithfully, and in accordance with his contract, done his work.' He testified further that the foreman had the right to take the work away from them, when for any cause they neglected to perform it within a reasonable time, and to re-let any uncompleted portion paying pro rata for the part performed; and that, whenever the foreman's attention was called to any specific violation of the 'contract,' he had the right to annul the contract or to compel the grader to do the work as he had contracted to do it; and that the foreman pointed out to the grader the 'amount and nature' of the work, directing him as to the width and height of the embankment, and where the earth was to be taken from, etc., etc. In other words, what this witness termed the 'stipulations of the contract' with the graders, were evidently nothing more than directions from the foreman and engineer to the graders as to the mode and manner of doing their work, and if it was not done in accordance with those directions, the grader was forced to comply with them, or else be dismissed without pay for the uncompleted or imperfect work. Under these circumstances we think that these graders, instead of being independent contractors in the sense that would relieve the employer company from responsibility for their negligence, are sunk to the level of ordinary labouring servants to the company who was their master, and that the company was properly held to be reliable for the damage resulting from their negligence in the performance of the work they were put by the company to perform for its use and benefit." *St. Johns & H.R. Co. v. Shalley* (1894) 33 Fla. 397, 14 So. 890 (fire negligently started damaged property of adjoining landowner).

In another case where, after a construction company had partially performed its contract for the building of a railroad, the contract was abandoned by the parties in many material respects, and the railroad company by its own officers and servants, took charge of and supervised the work, gave directions as to how the road-bed should be constructed, and assumed general management and control of the enterprise, it was held that the railroad company could not relieve itself of liability for injuries occasioned by negligent or improper construction, but was primarily responsible. *Savannah & W. R. Co. v. Phillips* (1892) 90 Ga. 829, 17 S.E. 82 (fireman of construction train injured by defective track).

Evidence that the defendant's representative hired other labourers on a gang besides its foreman, that he had previously discharged and taken back the whole gang, that he refused employment to some men, that he directed men when to go on and stop work, will warrant a jury in finding that the defendant was the master of the foreman and the labourers on the gang. *Daley v. Boston & A.R. Co.* (1888) 147 Mass. 102, 16 N.E. 690.

Men who were employed to load coke on the cars of a railway company, and who were paid by the number of cars loaded, and who, as the undisputed evidence showed, did their work under the immediate supervision and control of the

company's superintendent, were held not to be independent contractors. *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465, 22 So. 403 (labourer threw a heavy board down into the street without looking).

One who has made with the owner of a street-car line a contract under which, for a specified amount per month, he is to haul a car over the line once a day each way and to furnish a driver, is a servant of the owner, and not an independent contractor. *Jensen v. Barbour* (1895) 15 Mont. 582, 39 Pac. 906 (boy was thrown off the front platform by a jolt and run over). The court based its decision on two grounds: (1) that the reservation of a power of control was indicated by the fact that the defendant's agent was accustomed to give directions for the protection of property, and to warn the driver not to allow boys to ride on the car; and (2) that there was no force in the contention of defendant's counsel, that the person employed represented the will of his employer only as to the result of his work, and not as to the manner of its performance;—or in other words that he contracted to deliver to his employer the result of putting the car over the track once a day by his own methods. In answer to the latter point, the court said: "So it might be argued that one's coachman contracts to produce the result of conveying his master from his house to his office, or wherever he may wish to go, or one's cook contracts to produce the result of placing before his master his daily food. But such is not the sense in which the word 'result' is used in the rule. We think that the word 'result' as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship, or a locomotive; and such house, or ship, or locomotive produced is the 'result.' Such 'results' produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage, or a horse-car, for one trip or for many trips a day, is a 'result' in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service."

(2) *Construction of buildings.*—In a case where a person rightfully on the defendant's premises was injured by the collapse of a wall, it appeared that, in order to support the wall during the process of undermining, pieces of timber, denominated "needles," were extended through it, intended to rest upon firm earth on both sides. The negligence as alleged, and as the proof tended to show, consisted in the failure to extend them through sufficiently to enable them to rest on solid ground on the inside of the wall. This work was not provided for in the original contract and the mode of supporting the walls, while being undermined, was directed by the architect, who was employed to superintend the erection of the building. It was held that, as it was proved that the defendant had the ultimate power, as owner, to order how this work should be done, he was liable, although the mode was left to the judgment and direction of the architect. *Campbell v. Lunsford* (1887) 83 Ala 572, 3 Am. St. Rep. 758, 3 So. 449.

In a case where the fall of a building on adjacent premises was caused by digging a trench too long and deep alongside the wall, the contractor declared that "the excavation should be carried to such general depth as might be indicated by the engineer;" and that "excavations for the trenches and piers should be made as required from time to time in the progress of the work, and to such an extent as might be indicated by the engineer." There were also statements that the engineer was "in charge of the work," and that men who neglected to obey his orders were to be discharged by the contractors. The Court said: "The very act complained of here is the digging of the trench too long and too deep in the circumstances. The act is charged as negligence. It was ordered by defendant's representative on the spot, acting for the chief engineer who had express power to direct 'by his authorized agents,' as well as personally. The work was done precisely as ordered. Thus it was the exercise of the discretion or judgment vested in the supervising authority, which caused the catastrophe; and for that exercise of judgment defendant must respond." *Larson v. Metropolitan Street R. Co.* (1892) 110 Mo. 234, 16 L.R.A. 330, 33 Am. St. Rep. 439, 19 S.W. 416.

In a case where the evidence showed that the defendant had contracted to erect a brewery, and that he had let out to one W. the contract for general work, including the hoisting into position of the iron required in the building; that W. employed and discharged his own mechanics and laborers; and that the defendant communicated with him, and not with the men employed by him, the

Court remarked that "nevertheless, there was, upon the one hand, an uncertainty as to the precise limitations of the contract, and, upon the other, a certainty that the defendant was continually on hand, and in control, even though his directions as to how the work should be done were given to W." The conclusion arrived at, therefore, was that W. was not an independent contractor in such a sense as to relieve the defendant of liability for his conduct in the prosecution of that work. *Moffet v. Koch* (1901) 106 La. 371, 31 So. 40 (iron truss being placed in a dangerous manner without proper bracing tilted over and fell to the ground).

In a case where the goods of tenants of the a building were injured through the negligent manner in which an employ  of the landlord had repaired a gutter over a party wall, the evidence relied upon as showing that the employ  was under the control of the defendant, and therefore in "legal contemplation" his servant, comprised the following facts: That the job was a light one, that the defendant had not surrendered the premises while the work was being done, that he had instructed the employ  not to do the work when rain was threatened, and that he had ordered the employ  to "go ahead" when the latter explained what he thought best to be done. *Mumby v. Bowden* (1889) 25 Fla. 455, 6 So. 453.

In *Hart v. Ryan* (1889) 3 Silv. Sup. Ct. 415, 6 N.Y. Supp. 921 (removal of lateral support damaged a building), it was held that the trial judge properly refused to hold upon the evidence that the defendants, the principal contractors for the erection of a building, were not liable by reason of their arrangement with one K. as to excavations, the evidence being to this effect: that K. was to be paid by the yard for such excavations as he made; that it was his duty to follow the direction of the defendants from time to time, as to where and when he should dig; that they supervised the work; and that Ryan gave directions to the men there. Under these circumstances, it was considered that, if K. made an excavation that caused the damage upon the plaintiff's land, it was with the knowledge and apparently with the direction of the defendants. Hence, if upon all the evidence, the jury found that the footing-course was erected upon the plaintiff's land, K., as well as the defendants, became trespassers upon the plaintiff's premises.

A landowner who continues to manage and control the work of excavating under the wall of an adjoining building, is liable, notwithstanding a contract with a third person for its performance, for damages resulting from the work. *Dunton v. Niles* (1892) 95 Cal. 494, 30 Pac. 762; *Watson Lodge No. 32, I.O.O.F. v. Drake* (1895) 16 Ky. L. Rep. 669, 29 S.W. 632.

It was held that one who had contracted to supply a building with an automatic fire extinguisher, and had sublet the making of the tank to responsible and competent builders, was liable to third parties for damages caused by their negligence, where his agent had general supervision of the work, and caused the damage by directing the plaintiff's servant to let water into the tank without ascertaining whether it would hold water. *Butts v. J. C. Mackey Co.* (1893) 72 Hun. 562, 25 N.Y. Supp. 531. Affirmed in (1895) 147 N.Y. 715 (memo.), 42 N.E. 722.

An employer who is sued for a personal injury received by an employ  from the falling of an ice-house cannot escape liability on the ground that he reserved no control over the erection of the building, where the evidence shows that before the contract was let he consulted with the builder and determined the materials to be used and plan of construction, and was around the premises constantly while it was under construction. *Meier v. Morgan* (1892) 82 Wis. 289, 33 Am. St. Rep. 39, 52 N.W. 17.

In *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321, it was held by one half of an evenly divided court that, as the defendant's had retained a "continuous and active control" over the work of erecting a building, the case was not within the purview of § 2739 of the Civil Code of Louisiana, which declares that "the undertaker is responsible for the deeds of the person employed by him." The construction put upon this provision was that, under ordinary circumstances, the undertaker was *alone* responsible.

The inference that a man employed to make an excavation for a cellar, at a specified price, per diem and commissions on the outlay, was a contractor, and not a servant, cannot properly be drawn, where the evidence of the employer himself shows that he was exercising control over him in respect to the manner

in which the earth should be removed, so as to secure the safety of a house on the adjacent lot. *Mound City Paint & Color Co. v. Conlon* (1887) 92 Mo. 221, 4 S.W. 922.

The fact that a landlord, when employing a plumber to make some repairs, informs him that a tenant on the premises will show him what to do has no tendency to prove that the defendant reserves the right to direct how the work shall be done. *Burns v. McDonald* (1894) 57 Mo. App. 599.

(3) *Work in streets*.—In a recent English case, where the injury was caused by the negligence of H., a master plumber employed by a telephone company to connect the pipes which it was laying in a street for its wires, the evidence was that, according to the usual course of business, H. was sent for, and either came in person or sent one or two men, generally, and did the work as soon as he could. But there was no agreement that he should come at any specified time. On the occasion in question H.'s brother came to do the work alone, as H. was otherwise engaged. The defendant's local manager visited the work several times a day to see that the joints were properly made, and he stated in evidence that, if the work were not satisfactory he could put an end to the contract. A finding by the City of London Court that H. was a servant was held by the Divisional Court not to be justified by the evidence; but the Court of Appeal was of opinion that the finding should be allowed to stand. *Holliday v. National Teleph. Co.* (1899) 2 Q.B. 392, 68 L.J.Q.B.N.S. 1016, 81 L.T.N.S. 252, 47, Weekl. Rep. 658, reversing (1899) 1 Q.B. 221, 68 L.J.Q.B.N.S. 302.

(4) *Clearing of land*.—The independence of the contract is negatived where the evidence is, that a person agreed to clear a piece of land at a certain price per acre, but that the employer watched the progress of the work, gave advice as to the setting of the fire to burn the timber and brushwood, and when he was told that a certain fence which extended to the plaintiff's land might take fire, said that it made no difference. *Johnston v. Hastie* (1870) 30 U.C.Q.B. 232.

In a case where one Jewell had made a contract with the defendant for removing trees, the former testified that he was to furnish teams and men for a certain price, and that either he or one Dinkel was to be present and act as foreman under the direction of one Ward, who was the defendant's foreman, and was to do the work pursuant to his direction. Ward was present a part of the time while the work was progressing and pointed out what was to be done. The witness said: "We did not usually do anything that Ward did not first tell us to do." The directions first given by Ward consisted in pointing out the particular piece of work to be done, such as the excavation for the foundation of a barn, and construction of a ditch. For new pieces of work Dinkel and Jewell went to Ward; he directed them to take trees out whole. The defendants, Dinkel and Jewell received pay as foremen at a given price per day, and the men, material and expenses were paid for at cost, and bills rendered therefor with a certain percentage added as profit. On the other hand, the defendant stated, in effect, that he said a good deal to Mr. Ward on the subject of giving directions to Dinkel and Jewell, "as to the manner or method and means of doing this work, before I left; also while I was there before I had made my plans for going." The defendant was present when the work began, but while it was in progress he went away, and subsequently communicated with Ward in reference to the work. The defendant also testified that he gave no directions, either himself or through Ward to Dinkel or Jewell, except in the expansion of the work, and in additional items of work to be done. The court thus commented on this evidence: "If the arrangement was that Dunham was simply to give directions as to the work to be done, and did not give or had no authority to give direction as to the manner in which it should be done, or as to the means to be used in performing it, then he would not be liable for any injury resulting from the method of its performance, as there would be no relation of master and servant. But the evidence authorized a different inference from this. As we have seen, Dunham said that he did not give directions as to the manner, method and means of doing the work, and Ward carried out this view when he directed that the trees should be taken out whole, and he gave such direction in relation to blasting the particular tree out of which the injury arose. It was not necessary that the directions should embrace every detail in doing the work." *Sullivan v. Dunham* (1898) 35 App. Div. 342, N.Y. Supp. 962 (tree which was blasted out whole fell on plaintiff).

(5) *Work in manufacturing establishments.*—A “boss roller” employed to manufacture iron and steel at his own expense, with motive power furnished by the employer, at a certain amount per ton, to be distributed to him and his assistants, who are employed by him and subject to be discharged by him, as well as by his employer, - is not an independent contractor, but a foreman only; and therefore the relation of master and servant exists between his employer and his assistants, notwithstanding that their compensation is fixed and paid directly by him, where he has no duty or right to repair the machinery, and the manufacturer exercises some control of the manufacture between the delivery of the material and the acceptance of the product, although the details are left to him. *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N.E. 803.

(6) *Work done with teams.*—One who is engaged in delivering coal for a fuel company, who is paid weekly by the ton, and who owns the team and the running gear of the wagon, the company furnishing the wagon box, and his employment being continuous until suspended, is a servant of the company, and not an independent contractor; and the company is liable for injuries from his negligence in replacing the cover of a coal opening so insecurely as to be dangerous to persons passing along a sidewalk. *Waters v. Pioneer Fuel Co.* (1892) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N.W. 52. The testimony relied upon by the court was, that he had worked for the company about three months, hauling coal daily, that he had in the meantime rendered service for no one else, that he appeared to be subject to its orders, and that he was treated as one of its teamsters or drivers.

(7) *Unloading of ships.*—In a case where the injury was caused by the negligent manner in which a truck used for hauling lumber from the wharf on which it was being unloaded from a ship to a shed where it was being stored, it was held that the question whether the defendant was liable had properly been left to the jury, where there was evidence going to shew, that the negligent person was employed as an assistant by one of three men who on previous occasions had often been engaged as ordinary dock labourers by the defendant, but had in this instance undertaken to unload the timber and place it on trucks, for a specific compensation, estimated with reference to the amount handled, and the defendant's foreman had admitted, on cross-examination, that, if he had seen that a truck was not properly loaded, he would have spoken to the contractors themselves, or, if none of them had been present, to the men who were loading the truck. Lord Esher said that, when the foreman's evidence came to be looked at, it shewed that, under certain circumstances, he would have interfered with the men engaged by the contractors, if they were doing their work wrongly, and that, taking into consideration this fact, and all the circumstances, under which the dock company carried on its business, it was impossible to say that a jury would not be justified in finding for the plaintiff. *Ruth v. Surrey Dock Co.* (1891) 8 Times L.R. 116.

That the alleged contractor was a servant, and that he was paid not as a master-workman, but as a foreman of the defendant's, was held to be a justifiable conclusion, where he had testified that he was a “lumper” working at the wharves along the river side; that the terms agreed upon between himself and the defendants were that he should get the barge in question discharged and should be paid at the rate of 1s. 9d. for every ton that was unloaded, he managing everything necessary to perform the work; that he selected, as he liked, the men who were to work under him; but that they were to work as if he were foreman; and that the nature of the employment was such, that he could not dismiss any workman without reference to the defendants. *Charles v. Taylor* (1878) L.R. 3 C.P. Div. 492, 38 L.T.N.S. 773, 27 Weekl. Rep. 32, per Brett, L.J.

(8) *Sale of commodities.*—If the control which is the diagnostic mark of the relationship of master and servant was, as a matter of fact, exercised over him—and this is primarily a question for the jury—a commercial traveller, even though he is paid by commission, is a “servant” within the meaning of the embezzlement statutes. *Reg. v. Tite* (1861) Leigh & C.C.C. 29, 30 L.J. Mag. Cas. N.S. 142, 7 Jur. N.S. 556, 4 L.T.N.S. 259, 9 Weekl. Rep. 554, 8 Cox C.C. 458. *Rex v. Carr* (1811) Russ. & R.C.C. 198. *Reg. v. May* (1861) Leigh & C.C.C. 13, 30 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 680, 9 Weekl. Rep. 256, 8 Cox C.C. 421. *Reg. v. Bailey* (1871) 12 Cox C.C. 56, 24 L.T.N.S. 477.

Other cases in which the circumstance that the employer did, in point of fact, interfere and control the employes in the course of their work has been adverted

22. —by the character of the stipulated work. — The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work. In other words it was considered that, although the persons employed might be exercising an independent calling, in the sense that they held themselves out as being prepared to do certain kinds of work for such parties as might engage them, the relation which they bore to those parties, during the progress of such work as might be undertaken by them, was in law that of a servant (*a*). The

to as a cumulative element supporting the conclusion that they were mere servants, are *Serandat v. Saisse* (1866) L.R. 1 P.C. 152, 35 L.J.P.C.N.S. 17, 12 Jur. N.S. 301, 14 Weekl. Rep. 487 (see §. 22, post); *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399.

(*a*) In *Sadler v. Henlock* (1855) 4 E.L. & B.L. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181, the defendant directed a man named Pearson to cleanse out a drain on his land. Pearson was not otherwise in the employment of the defendant; he was a common labourer who had originally made the drain. Pearson executed the work with his own hands, and charged the defendant five shillings for the job, which the defendant paid. The defendant was not shewn to have interfered with the work, or to have seen the way in which it was executed, or to have given any specific directions. Pearson, in clearing out the drain, took up the part of the highway under which the drain passed. After completing the work, he replaced the soil of the highway, but imperfectly, and with insufficient materials; and, in consequence, it gave way, while a horse belonging to the plaintiff, and on which plaintiff was riding at the time, was passing over it; and the horse, by falling into the hole thus made, was injured. Upon this evidence it was held that Pearson was a servant for whose negligence the defendant was responsible. Lord Campbell, Ch. J. said: "Had Pearson been the domestic servant of the defendant, and the defendant had said to him, 'go and clean out the drain,' no doubt Pearson, by doing the work negligently, would have made the defendant liable. Then what difference can it make that Pearson was an independent labourer, to be paid for the job? The defendant might have said, 'fill up the hole in the road, but not as you are, now doing it, lest, when a horse goes over the place, he may be injured.' Pearson was therefore the defendant's servant; and, if so, *cadit quæstio*."

Coleridge, J., said: "If the work had been done by his own hand he would have been responsible. So he would if it had been done by his servant or by a common labourer whom he had employed. On what ground? Because the party doing the act would have been employed by him. Instead of this, he employs a person who seems to have been usually employed in such works. Such person is just as much his servant, for this purpose, as a domestic servant."

Wightman, J., said: "Really the question is, whether Pearson is to be considered as the defendant's servant, or as a contractor exercising an independent employment. The whole evidence shows that the former is the correct view. Pearson was not a person exercising an independent business, but an ordinary labourer, chosen by the defendant in preference to any other, but not exercising an independent employment."

Crompton, J., said: "The real question is, whether the defendant and Pearson stood to each other in the relation of master and servant. I decide, not on the ground that Pearson did not employ the hands of another: for, if he was the defendant's servant, the defendant would be liable for the wrong doing of the

person whom the servant employed ; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstances of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." The last mentioned judge also remarked during the argument of counsel (p. 575) : " Is not this rather a case where the employer maintains a control over the person whom he employs ? A contractor chooses the mode in which the work is done, and the persons who do it. I thought the principle of the cases, which are cases of difficulty, was that the contractor had this power of choice."

In *Rait v. New England Furniture & Carpet Co.* (1896) 66 Minn. 76, 68 N.W. 729, the court, inclined strongly to the view that this decision would have justified it in holding, as a matter of law, that a person whose general occupation was that of carpenter and builder, and who was employed by a house owner to stop a leak in the roof of the house, and while engaged on the job, threw down some ice and snow on a passerby, was a mere servant. But it was declared to be at least, a question for the jury to say whether the defendant surrendered all control over the actions of the employé as to the manner of removing the ice and snow from the roof of the building. The construction thus put upon the English case is of very dubious correctness, when it is considered that the work there involved did not require any special skill, as in the case before the court. Upon the facts the Minnesota ruling is inconsistent with another English case, *Welfare v. London, B. & S.C.R. Co.* (1869) L.R. 4 Q.B. 696, 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065, cited in the following section, but is sustained by some of the American cases there referred to.

In *Tucker v. Axbridge Highway Board* (1889) 53 J.P. 87 where a trap was capsized by striking against a heap of stones which had been left beside a road by a man who had been employed to repair it, the defendant was held liable on the general ground, as it would seem, that, " if a person does merely menial work, then he is clearly a servant."

In a New Zealand case it was remarked, arguendo. " There is yet another point of distinction which has been referred to in several of the cases or is, perhaps, here applicable ; the employment of an ordinary labourer to do ordinary labourer's work by the piece, and the employment of persons skilled in a particular business." *Threlkeld v. White* (C.A. 1890) 8 New Zealand L.R. 513.

In *Sérandat v. Saïsse* (1866) L.R. 1 P.C. 152, 35 L. J.P.C.N.S. 17, 12 Jur. N.S. 301, 14 Weekl. Rep. 487, the respondent brought an action for injuries caused by a fire kindled on the appellant's land by labourers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made, that sparks and other burning particles were carried over and scattered upon the respondent's premises. The respondent grounded his claim for damage on the article 1384 of the Code Napoleon (the prevailing law of Mauritius where the action was brought), which is in these words : " les maîtres et commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés." The respondent contended that the appellant and the men he employed stood in the relation of Commettant and Préposé within the meaning of this article. From an examination of the authorities the conclusion was arrived at, that, subject to the qualification mentioned in the following sentence, the word " Préposé " in the article means substantially a person who stands in the same relation to " Commettant " as " Domestique " does to " Maître " i. e., a person whom the " Commettant " has entrusted to perform certain things on his behalf. It was observed, however, that the French lawyers, in their interpretations of the article, had qualified this construction by the doctrine, that in order to make the Commettant responsible for the negligence of the Préposé, the latter must be acting " sous les ordres, sous la direction, et la surveillance du Commettant." The evidence showed that there were two bands of Indian labourers employed, and that the work was to be paid for at a certain price per acre, but left it doubtful whether the appellant was to pay the price to the head men of each band, or to them and the Indians in their respective bands. On this evidence the contention of the appellant, that he had severed himself from the execution of the work, and parted with all superintendence and control over the persons by whom it was performed, was

rejected by the Privy Council, on grounds explained in the following extract from the judgment: "Having regard to the nature of the work, and the condition of the men employed, it appears to us unreasonable to infer that the appellant had parted with the power of correcting, as the work went on, the mode in which it was to be performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not shew that the general control, direction, and surveillance of the operations was relinquished by the appellant by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer the description given by Sirey ('Codes Annotés,' Vol. I. p. 655) of 'ouvriers d'une profession reconnue et déterminée'; they were ordinary labourers characterized by the Court below as 'a set of idle, careless semi-barbarians.' The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence, which shows that in point of fact the appellant did interfere and control the men in the course of the work. For example, it was said by Joondine. 'Mr. Sérendat told me not to put fire in the place where I was working;'. . . 'he told me to put fire in another place which he pointed.' Again, Beesapa says, 'The previous day Mr. Sérendat had come and told Joondine to leave that portion of ground which is fifty dollars, and go on and work in the interior of the field.' And the appellant's answer states that he had given orders some five or six days before to burn some weeds, but that he also gave orders that the fire should be carefully extinguished. Looking, then, at the whole case, we are of opinion that the appellant and the Indian whose negligence caused the fire stood in the relation of 'Committant' and 'Préposé.' And, as it has not been disputed that the negligent act was done by the 'Préposé' in the course of his employment, it follows that the responsibility of the appellant is made out."

A man employed by the defendant to cleanse out at certain intervals the contents of his ash-pit deposited them on one occasion in the street, preparatory to their being removed, and the plaintiff's vehicle was upset by the heap. The jury found that the contract was an entire one to remove the rubbish altogether, and not merely to take it to the street. It was held error to enter judgment for the defendant on this finding. Blackburne, J., remarked that the nature of the subject matter in such cases makes all the difference, and that, when regard was had to the act done in the house occupied by the defendant, and under his wife's directions, it appeared to have been but the ordinary act of a servant. *McKeon v. Bolton* (1851) 1 Ir. C.L. Rep. 377, 3 Ir. Jur. O.S. 288.

Where a city was constructing a waterpipe trench, and a labourer employed under the direction of the city's inspector and superintendent was assigned to the excavation of a 12-foot section of the trench, but he had no authority or discretion as to his work, it was held that he was not, therefore, an independent contractor but a servant, and that the city was bound to provide for his safety against caving of the banks while performing the work. *Ft. Wayne v. Christie* (1900) 156 Ind. 172, 5 N.E. 385.

Where a landowner who is about to rebuild a house which has been destroyed by fire, contracts directly with a labourer to make the excavation for the foundation for a specified price, instead of letting out the whole work to one person, it is error to give an instruction which would exclude from the consideration of the jury the possibility that the labourer was hired as a servant. *Stevenson v. Wallace* (1876) 2 Gratt 77.

In holding that a labourer engaged for 50 cents to drive an animal is a servant to the owner of the animal, and not an independent contractor court reasoned as follows: "There is nothing in the nature of the employment or in the contract to indicate that Simon [the labourer] was not subject to the control, supervision and direction of Blase, had he seen fit to exercise such control over Simon's movements. Nor is there anything whatever in the testimony to prove that Simon exercised a 'distinct calling,' as did the coloured teamster, Stevenson, in *Pink v. Missouri Furnace Co.* (1884), 82 Mo. 276, 52 Am. Rep. 376; and the licensed drover described in an English case cited by appellant [*Milligan v. Wedge* (1840) 12 Ad. & El. 737, 4 Perry & D. 714, 10 L.J.Q.B.N.S. 19]. Simon was doing any sort of ordinary work at that time.

authorities do not show distinctly the rationale of the presumption thus entertained. Essentially it may perhaps be said to reflect merely the understanding of the courts as to the terms upon which work is ordinarily contracted for under the circumstances indicated. It must be admitted, however, that it is not easy to adopt this explanation to three Scotch cases in which the employer was held liable. But these decisions seem to be inconsistent with the English and American authorities reviewed in § 12, ante (b).

To constitute an independent contractor, so as to relieve his employer from liability for his conduct, it must at least appear that the work to be performed was committed exclusively to the discretion of the contractor. The independence of the contractor may appear by the nature of the work sometimes, and at other times by the terms of the contract, or by the calling of the contractor. The nature of the work in question in this case, no less than the agreement itself, totally fails to establish a foundation for holding Simon to be an independent contractor in the matter of driving the cow to defendant's place of business. The fact that the work was to be paid for in one price is not decisive of the question." *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S.W. 764.

A porter who was occasionally employed by a butter-factor to leave parcels at the house of purchasers, and was paid by the persons to whom the parcels are delivered was also held to be a "servant" of such factor within the meaning of the embezzlement statutes, and not a person following an independent employment. *Reg. v. Lynch* (1854) 6 C.C. 445.

In a New York case the court remarked, *arguendo*, : "Undoubtedly, one cannot shield himself under the doctrine of independent contractors by simply employing another person, and giving him a general authority to procure others to assist in work which requires no care or skill or experience, but which is merely such as might be done by any person with sufficient physical strength." *Kuechel v. Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522.

(b) In a case where the plaintiff the proprietor of a mineral stratum which was damaged by fire which spread from the place where ironstone was being calcined, it was shown that the lessee of the ironstone workings had employed contractors to calcine it at so much per ton, payable at the end of every fortnight. Those contractors employed and paid all the workmen, the lessee having no direct management in the calcining operations. The jury were charged by Lord President Boyle that, in point of law, the lessee was responsible for the acts of these contractors, as they were in no different position from any other labourers hired by a master to work by the piece. *Rankin v. Dixon* (1847) 9 Sc. Sess. Cas. 2nd Ser. 1048.

In a later case, arising out of the same occurrence, the stipulations of the contract are set forth more in greater detail. The contractor agreed to employ the necessary number of miners to pay them their wages—to furnish various implements necessary for the workings, etc. After the first two months the output was to be not less than 100 tons of calcined stone weekly, and a failure to perform this stipulation entitled the contractee to terminate the contract by giving a written notice of one month. The working was to be carried on regularly and fairly, and agreeably to the instructions of the contractee or his overseer. The contractor, after the first month, had the right to abandon the job upon giving one month's notice. It was held that, as between the lessee of the ironstone and his landlord, the contractor was to be regarded as a mere servant of the lessee. Lord Colonsay seems to have based his decision mainly upon the fact that, under the contract, the lessee had a control over the calcining operations. In the course of the opinion, he said: "This is a case of injury done to a neighbouring property by a person who held a mixed character—at least whose trade had not yet assumed such an independent character as entitles us to hold that the defenders can get rid of the responsibility which attaches to them by employing such a person as Watson and his gangers, instead of

23. —by the fact that the employment was general.—According to the Supreme Court of Massachusetts, the intention of the employer to retain the right of exercising control, and consequently to create the relation of master and servant, should always be inferred, where it is shown that the employment was general, and not based on a contract to do a certain piece of work, on certain specified terms, in a particular manner, and for a stipulated price (*a*). A similar view is perhaps indicated by several cases

labourers paid directly by themselves." The two other judges relied upon the existence of a non-delegable duty (see § 66, post). *Nisbet v. Dixon* (1852) 14 Sc. Sess. Cas. 2nd series, 973.

In another case all the judges were of opinion that a master slater, engaged to put up a chimney-can and top, was not an independent contractor, although he had workmen in his employ and was to be paid not by day's wages, but at the ordinary rates chargeable for the work to be done. *Cleghorn v. Taylor* (1856) 18 Sc. Sess. Cas. 2nd series, 664.

(*a*) *Brackett v. Lubke* (1862) 4 Allen 138, 81 Am. Dec. 694, where it was held that the lessee of a building, who had employed a carpenter to repair an awning which extended from the building over a public way, was liable for an injury received by a passer-by in consequence of the carpenter's carelessness. The Court said: "This seems to us a very clear case. The defendants are liable, because it appears that the negligent act which caused the injury was done by a person who sustained towards them the relation of servant. There was no contract to do a certain specified job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it. If it was unsafe to make the repairs or alteration at an hour when the street was frequented by passers, it was competent for the defendants to require the person employed to desist from work until this danger ceased or was diminished. If the means adopted to gain access to the awning were unsuitable, the defendants might have directed that another mode should be used. In short, if the work was in any respect conducted in a careless or negligent manner, the defendants had full power to change the manner of doing it, or to stop it, and to discharge the person employed from their service. The mere fact that the work was done by one who carried on a separate and independent employment does not absolve the defendant from liability. If such were the rule, a party would be exempt from responsibility even for the negligent acts of his domestic servants, such as his cook, coachman or gardener. . . . If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But, on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient."

In *Dane v. Cochrane Chemical Co.* (1895) 164 Mass. 453, 41 N.E. 678, J., the negligent employé, received his orders for the carpentry work to be done, usually from one of the defendant's superintendents. He hired the men to be employed in doing the work, superintended, paid, and discharged them. The defendant paid J. \$2.50 a day for his work, and twenty-five cents a day for each man employed by him, in addition to the amount of the wages which he agreed to pay the man. So far as appeared, J. furnished the tools and the defendant

decided in other jurisdictions, but the precise grounds of the conclusions arrived at are not clearly defined. In two instances it may reasonably be supposed that the courts were, in some degree at least, influenced by the fact that the employment was not only general, but for an indefinite period (*b*).

the materials required to do the work. J. drew money from time to time from the defendant on account of what was due to him, and at the end of each month the accounts between him and the defendant were usually settled. J. paid his workmen every Saturday, but their names never appeared on the pay roll of the defendant; they never were paid by the defendant, and the defendant kept no account with them. Apparently J. kept workmen in his employ whom he used in performing work for other persons as well as for the defendant. It was held to be competent for the jury to infer, from this testimony, that the defendant was liable for the negligence of J. The court said: "When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of the work done by the carpenter and the men he employs, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work."

(*b*) In a criminal case it was held that a jury would be justified in finding that a person who, upon his representing to the prosecutor that he had a little spare time which he would like to occupy in collecting debts, was engaged to do such work was a "servant" within the meaning of the statute 7 & 8 Geo. 4. *Reg. v. Hughes* (1846) 2 Cox C. C. 104.

In another case it was held that, where the owner of a stone quarry hired a man to quarry, break, and pile up stone therein, at \$1 per perch, the employé to furnish the gunpowder and tools, the employer was liable to an adjoining proprietor for injury to a building by one of the blasts, although ordinary care was exercised in the manner in which the quarry was worked. *Tiffin v. McCormack* (1878) 34 Ohio St. 638, 32 Am. Rep. 408. The court said: "We are of the opinion that the true relation between the city, as proprietor of the stone quarry, and Ardner, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no 'job' or defined quantity of work contracted for. The services of Ardner were subject to be determined at the pleasure of either party. The compensation was to be measured by the quantity of labour performed. It appears to us to have been an ordinary contract for work and labour, which creates, between the employer and employed, the relation of master and servant, within the meaning of the law in regard to that subject. It is true that the service, namely, the quarrying of stone in the employer's quarry, was to be done by the use of powder and tools furnished by the employé; but this condition in the contract did not affect the legal relation between the parties. It was significant only as a matter affecting the rate of compensation. And it is also true, that the city 'had no other or further control over Ardner in said work.' Whether this language means that the city exercised no other or further control, or that the city contracted with Ardner that it would not exercise any other or further control over the work, makes no difference. If it were a mere failure to exercise control, it was the fault of the city. If it was part of the contract with the servant, that no other or further control should be exercised by the city, it is enough to say that a master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him, and will not, therefore, be responsible for any injury that he may wrongfully inflict."

A part of the machinery in the defendant's mill was a "slasher," the sole use of which was to cut slabs and other material belonging to the defendant into proper lengths for shingles, lath and pickets, which when cut, were to belong to the defendants. The defendant kept this machine in running order, defrayed the

expense of oiling and repairing it, and furnished the necessary power and light; but he contracted with B. to do the manual work needed for the operation of the machine, giving him no authority to use it upon other material of his own, or for anybody other than the defendant. For doing this manual work, the defendant agreed to pay him a price measured by the product. While nominally B. was to employ and pay for such assistance as he needed, the wages of the helpers were paid by the defendant and deducted from the amount which otherwise should have been due to B. The conclusion of the court was that, upon the facts stated, B. was not an independent contractor, but a servant of the defendant, put in charge of a particular machine upon the terms stated, to operate it for the defendant, and that whatever duty there was to notify an inexperienced person engaged to work on or about it, of the dangers incident to the employment, remained a duty of the defendant. *Nyback v. Champagne Lumber Co.* (1901) 48 C.C.A. 632, 109 Fed. 732.

Where a man who had agreed to trim certain shade trees in front of a house, and to receive the wood as compensation for the work, cut off a limb in such a manner that it fell on and bent down a telephone wire stretching across the street, and the wire, while in that position damaged the top of a buggy, the court held that there was nothing in the case to suggest, in the remotest degree, that the man whom the defendant employed was in the exercise of an independent employment. It was observed that the circumstance that he was to cut the trees for the wood instead of for cash, indicated merely the mode of his payment, and threw no new light upon the nature of his employment. If anything, the presumption arising from this mode of payment militated against the notion of an independent employment in respect to which the employer had surrendered all control, as the parts of the tree to be cut must have been at the election of the employer; otherwise the workman might take the whole tree as his compensation for trimming it. The court summed up its view as follows: "The facts agreed upon present in the clearest manner, prima facie, a case of employment as master and servant. If the employer seeks to avail himself of the protection afforded him by the less intimate relation of employer and contractor, it is incumbent upon him, by proof, to establish the facts essential to the applicability of the rule of law he invokes." *State v. Swayse* (1889) 52 N.J.L. 129, 18 Atl. 697.

If a house owner employs a blacksmith to adjust and secure the cover over a coal-hole, the blacksmith, being subject to the direction and control of his employer and liable to be dismissed at any time, is not an independent contractor for whose negligence the owner would not be liable. *Dickson v. Hollister* (1889) 123 Pa. 421, 10 Am. St. Rep. 533, 160 Atl. 484.

The existence of the relation of master and servant was held to be inferable, where a person who had made a contract to put down a sidewalk executed a written document by which he agreed to furnish another person, at the place where the work was to be done, the rough stone which, for a stipulated price, he was to cut, dress, haul, and set in the sidewalk. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

In *Perry v. Ford* (1885) 17 Mo. App. 212, where the plaintiff fell into a privy vault which, while under repair, had been left without guards or lights, the only direct evidence as to the contract made by defendant for the repairing certain water closets was the testimony of the defendant himself, who said: "I gave the contract to repair this closet to Mr. Cotter, and when he got ready to repair it, I went with him into the saloon and told Mr. Alms I was now ready to repair this closet." It was shown that the employes of Cotter, a plumber, did the actual work of repairing, and that the defendant was frequently present while the work was being done. It was argued by counsel for defendant that the mere bare statement that defendant gave the contract for the work to Cotter, raised a presumption that the relation between them was that of contractee and contractor, and not that of master and servant. This contention did not prevail. The court said: "Every contract made by the owner of a building for repairs therein does not create the relation of contractee and contractor between the owner and the person contracted with. . . . If in this case the defendant could have directed the time and manner of doing the work; if it had been unsafe to do the work at a certain time or in a certain manner, and the defendant could have required Cotter to desist, or could have altered the manner of doing the work. . . . The mere fact that Cotter followed a certain trade or profession, or carried on a

But there is a considerable weight of authority against the acceptance of the doctrine thus relied upon, in so far as it is put forward as one which, irrespective of the nature of the stipulated work and the industrial status of the person employed, furnishes an adequate and decisive test of the character of the contract (c). So far as Massachusetts is concerned, it would almost seem permissible to infer from the reasoning of a recent decision that the original doctrine, as above stated, no longer prevails in that state, or that it has at least been somewhat modified (d).

separate and distinct employment does not change the rule. . . . It cannot then be presumed that Cotter was a contractor, and not a servant, from the mere general statement by defendant, that he had given the contract to Cotter. But if the defendant wants to relieve himself of liability as master in this case by reason of the relation of contractor, the defendant must prove the existence of that relation. If the defendant wishes to escape liability because by the terms of the contract his liability has been imposed upon Cotter, he must prove the terms of the contract. From the evidence in this case the terms of the contract do not appear and we cannot say that Cotter was not defendant's servant. The presumption is that Cotter was such servant. The evidence does not tend to rebut that presumption."

See also the Illinois cases cited in § 28 (b) post.

(c) In *Welfare v. London, B. & S. C. R. Co.* (1869) L.R. 4, Q.B. 696, 38 L.J.Q.B.N.S. 241, 20 L.T.N.S. 743, 17 Weekl. Rep. 1065, Cockburn, Ch. J., in discussing the liability of the defendant company for injuries alleged to have been caused by a workman employed to repair the roof of one of its stations, said: "If it were necessary to determine that question, we should have to consider whether the case was improperly withdrawn from the jury on the ground that the plaintiff offered no evidence to show that this person was the servant of the company. I agree that, where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done; but in the case of work of this description it seems to me that the principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings; they employ a builder whose particular business is to do it. This being a matter of universal practice and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point."

In the same case Blackburn, J., observed: "I quite agree with what my lord has said with reference to the normal state of things, that people who are employed to repair roofs are independent tradesmen, and not mere servants; and the onus of proving that this man was the servant of the company was on the plaintiff, and he is not presumed to be so; it must be proved, because it is an exceptional case."

In New York it has been laid down that, where a mechanic is employed by the owner of a building to make repairs, "without any specific arrangement as to conditions," his employment is independent. *Hexamer v. Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

(d) See *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405. The court held that the contract was an independent one, although the report of the auditor stated that the employment was general. See § 11, note (b), subd. (2), ante.

24. —from the partition of the work among several contractors.— In a Pennsylvania case where the plaintiff, while passing along a street, fell into an unguarded excavation which had been made in the course of building operations, the court approved a charge of the trial judge to the effect that, where the work is split up in different contracts, and the owner undertakes to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for the supervision of the work or the erection and maintenance of guards around it, it is justifiable to draw the inference that the owner retained the supervision, and that his duty to protect the public has not been devolved on others (a). In the argument of the court it is taken for granted that, under such circumstances as those involved, an employé may by an express stipulation devolve upon a contractor the duty of protecting the public—a doctrine which had been established in Pennsylvania by an earlier ruling (b), but which is discredited by the weight of authority. See § 51 post. In most jurisdictions, therefore, the special consideration upon which the court relied would have no force, as the employer would have been held liable on the simple ground that a non-delegable duty had not been fulfilled, and irrespective of the question whether the work had be undertaken by one or several contractors. The present writer has found only one other case in which it has been intimated that the partition of the work among two or more contractors may be a sufficient reason for charging a principal with liability for their negligence (c). Such a limitation of the general doctrine seems to be quite arbitrary and irrational, and there are not wanting decisions in which it has been ignored or repudiated (d).

(a) *Homan v. Stanley* (1870) 66 Pa. 464, 5 Am. Rep. 389.

(b) *Allen v. Willard* (1868) 57 Pa. 374, where a principal contractor was sued for an injury caused by the negligence of a sub-contractor in leaving unguarded an excavation under a footpath. It was laid down that, although the defendant would not have been liable, if he had committed to the sub-contractor the entire control of the work of making the excavation, he should be held responsible for the reason that the evidence was insufficient to establish the conclusion, that the control of the work had been thus transferred.

(c) *McCleary vs Kent* (1854) 3 Duer, 27, where the remark was made, arguendo, with reference to the liability of a contractor for the negligence of sub-contractors.

(d) In *Treadwell v. New York* (1861) 1 Daly, 128, it was held that a person who employs two independent contractors to execute different portions of the

25. Nature of contract determined with reference to the degree of skill required for the work.—The fact that the work to be done was such as required special skill for its proper performance is frequently referred to in cases where the contract was held to be independent (*a*). This circumstance may be regarded as one of those which has some tendency to shew that the relation between the employer and the person employed was not that of master and servant (*b*). But no case has been found in which it has been credited with a distinctly differentiating significance; and there are many instances in which it has been wholly disregarded. See especially §§ 22, 23, ante.

26. —the existence or absence of an obligation to perform the work in person.—A natural deduction from the ordinary conception of an independent contractor, viz., that he is essentially an employé who merely agrees to produce certain specified results by any means which he may think proper to select, is that, unless restricted by some express stipulation, he will always be entitled to use the labour of others in executing the work which he has undertaken. It follows, therefore, that, if the terms of the contract are such as to indicate that the person employed may, if he so desires, perform the stipulated work by deputy, it will usually be inferred that he is not engaged as a servant (*a*). That this was

work of constructing a building is not liable to one of them for injuries caused by the negligence of the other.

In *Martin v. Tribune Asso.* (1883) 30 Hun, 391, the defendant was held not to be liable for the negligence of one of several mechanics who had been employed to do different parts of the work of constructing a building.

In *Potter v. Seymour* (1859) 4 Bosw. 140, Hoffman, J., remarked: "When we once arrive at the principle that employment, control, and supervision, or the right to such, over the person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building, as to a contract for the whole."

(*a*) See for example, *Murray v. Currie* (1870) L.R. 6 C.P. 24, 40 L.J.C.P.N.S. 26, 23 L.T.N.S. 557, 19 Weekl. Rep. 104; *Hexamer v. Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755; *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522; *Lawrence v. Shipman* (1873) 39 Conn. 586; *Morgan v. Bowman* (1856), 22 Mo. 538.

(*b*) In *Threlkeld v. White* (1890) 8 New Zealand L.R. 513, it is referred to as an evidential factor of this quality.

(*a*) This rule is illustrated by the decisions which exclude from the scope of statutes specifically applicable to masters and servants all agreements under which the person employed is not obliged to perform the work himself. Thus it has been held that a person to whom a Government contract for road-work, which is to be done according to certain specifications, and paid for at so much per chain, had been sublet, was not a servant within the purview of the Masters and Servants Act of New South Wales. *Ex parte Rathbone* (1892) 13 New So. Wales, L.R. 56.

the effect of the contract may perhaps be concluded in most instances, if the person employed did, as a matter of fact, execute the work by the hands of another (*b*).

On the other hand, as the principle of the maxim, *Delegatus non potest delegare*, is understood to apply in its full force to a servant, it is perhaps permissible to lay down the doctrine that, if it should appear, either from the nature of the employment, or the terms of the agreement, that the person employed is expected to do the work with his own hands, the appropriate inference will usually be that he is engaged as a servant. But there is very little judicial authority upon this specific point (*c*).

27. —the reservation of a right to terminate the contract of employment.—The existence of the right of controlling an employé in respect to the details of the work normally implies that the employer has also the right to discharge him. Hence it is laid down that the relation of master and servant will not be inferred in a case, where it appears that the power of discharge was not an

So, also, it has been held that the corresponding statute in Victoria is not applicable to an employé whose position is defined by the acceptance of his offer to paint a certain number of railway trucks to the satisfaction of the owner. Under such an agreement there is nothing to prevent the contracting party from getting the work done by deputy. *McElroy v. Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953.

It is not irrelevant to mention in this connection that, in construing the English Truck Act (1 & 2 William 4, chap. 57), the Courts have held a person is or is not a "labourer" or an "artificer" within the scope of its provisions, according as he is or is not bound to execute in person the work which he has undertaken to do, the theory being that these terms are intended to apply only to persons who are actually and personally engaged to perform the work. *Riley v. Warden* (1848) 2 Exch. 59, 18 L.J. Exch. N.S. 120; *Bowers v. Lovekin* (1856) 6 El. & Bl. 584, 25 L.J.Q.B.N.S. 371, 2 Jur. N.S. 1187, 4 Weekl. Rep. 600; *Ingram v. Barnes* (1857) 7 El. & Bl. 115, 26 L.J.Q.B.N.S. 319, 3 Jur. N.S. 861, 5 Weekl. Rep. 726; *Floyd v. Weaver* (1852) 16 Jur. 289, 21 L.J.Q.B.N.S. 151; *Sharman v. Sanders* (1853) 13 C.B. 166, 3 Car. & K. 298, 22 L.J.P.C.N.S. 86, 17 Jur. 9 N.S. 765, 1 Weekl. Rep. 152; *Sleeman v. Barrett* (1864) 2 Hurlst & C. 934, 33 L.J. Exch. N.S. 153, 10 Jur. N.S. 476, 9 L.T.N.S. 834, 12 Weekl. Rep. 411. See the present writer's treatise on Master and Servant, pp. 2063, 2064.

(*b*) The somewhat guarded remark of Crompton, J., in a leading case, was, that the fact of another person having having been engaged by the negligent employé to carry out the stipulated work "may sometimes be a test as to whether the employer was a servant or an independent contractor." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181.

(*c*) In *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B.N.S. 138, 3 Weekl. Rep. 181, while one of the counsel was arguing that the workman was not the personal agent of the defendant and that he might have employed a third person to do the work, Lord Campbell interposed the remark: "I doubt that: if I select a person in whom I place confidence, can he employ another?"

incident of the contract of employment (a). The converse of this rule, however, holds only to a limited extent. According to the authorities, the conclusion that the person employed was not an independent contractor is indicated by evidence that he was liable to dismissal at any time, and the case is for the jury whenever such evidence has been introduced, and the rest of the testimony is either of an ambiguous quality, or has itself a tendency to establish the same conclusion (b). That a similar significance is

(a) *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176.111.100, 52 N.E. 17.

(b) In a case where the plaintiff was injured by the fall of a shoot which had been negligently fastened by a coservant, it was held that a jury could not have properly found that the immediate employer of the injured person was an independent contractor, where the evidence was, that certain shipowners had arranged to have the goods arriving in a ship delivered through their agents, a firm which was one of the defendants in the action; that these agents had made a contract with one, J., who had been a foreman on the dock quay, and who himself worked on the quay; that this contract provided that the agents might at any moment stop J. from going on with the work; and that, after the accident, the agents, in a letter to the plaintiff, had referred to J. as their "foreman." The court seems to have considered the nonsuit proper even without reference to the last mentioned detail. *Oldfield v. Furness* (C.A. 1893) 58 J.P. 102, 9 Times L.R. 515.

The fact that the employé was liable to be discharged was emphasized in *Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491.

A. received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between B. and certain local commissioners. A clause in the contract prohibited sub-letting without the engineer's consent. B. contracted by parol with N., a competent workman, to do the excavation and brickwork, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks, and carted away the surplus earth. B.'s name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N., if dissatisfied with the execution of the work. The clerk of the works was in the employment of the commissioners. Held, that there was evidence of B.'s liability. *Blake v. Thirst* (1863) 2 Hurlst & C. 20, 32 L.J. Exch. N.S. 189, 11 Weekl. Rep. 1034, 8 L.T.N.S. 251. Martin, B., said: "The view which I take of this case does not rest upon the authority of *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T.N.S. 750, 9 Weekl. Rep. 274. I think the relation of master and servant clearly existed between the defendant and Neave, within the principle established by the more recent decisions."

Bramwell, B., said: "The evidence, I think, showed that the defendant had a right to control the way in which the work was to be executed. Suppose the defendant had made two contracts with different persons; with one, that he should dig the excavation; with the other, that he should light and watch it. It could not, I apprehend, be then contended that he would not be himself responsible. I think he is no less responsible here, though there is but one contract with a single individual."

The defendants' testimony tended to show that there prevailed in their factory a so-called 'contract' system, and S. was one of the contractors employed by them. He worked under agreements with the defendants to make seat-frames at an agreed price per piece, the work being done by him in their factory. They furnished him with the stock in the rough, with the machinery, the power, and the room to work in, and kept the machinery in repair. He worked for no one else; there was no fixed term to his employment; and it was liable to be ended at any time, at their instance. It was held that although the jury

to be attached to a clause in a written contract by which the employer reserves the power of revoking it at short notice, if the work should not be done satisfactorily, may perhaps be inferred from a case already cited in another connection (*b*). But it is well settled that, if the remaining provisions of a contract shew that it is an independent one, the mere fact that the employer has reserved the right to cancel, annul, or revoke it, or to suspend, or re-let the work, if there is some specific ground for dissatisfaction, will not cast upon him the responsibilities of a master (*c*).

28. —the surrender or retention of the control of the premises on which the stipulated work was done.—(a) Control surrendered.— With respect to that large class of cases in which the stipulated

should find that S. agreed with the plaintiff as to his wages, there was testimony in the case which required the submission of the question to the jury, whether Swain was a contractor or servant. *Goldman v. Mason* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337.

(*b*) *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303. See § 19 ante.

(*c*) Provisions which have been held not to negative the conclusion that the person employed is an independent contractor are the following :

That the employer's engineer may declare the contract forfeited "for non-compliance with his directions in regard to the manner" of doing the work. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 48 Atl. 215 ; that, in the event of the works being delayed, the architect supervising the work, as the representative of the employer, shall have the right to employ another person to carry out the contract. *Robinson v. Webb* (1875) 11 Bush, 464 ; that in case of improper or imperfect performance, "the contract may be re-let. *Kuehn v. Milwaukee* (1896) 92 Wis. 263, 65 N.W. 1030 ; *Pioneer Firproof Constr. Co. v. Hansen* (1898) 176, 111-100, 52 N.E. 17, Affirming (1897) 69 111 App. 659 ; that if, at any time, the contractors are not employing men, tools, implements and machinery, in kind and quantity, to the entire satisfaction of the chief engineer of the company, and necessary, in his opinion, to prosecute the work with due diligence and expedition, . . . the employer shall have the right to declare the contract annulled, after serving notice upon the contractor. *Burmeister v. New York Elev. R. Co.* (1881) 15 Jones & S. 264 ; that, if the work is not done by a sub-contractor to the satisfaction of the principal employer's engineer, the contract is to be forfeited on two days' notice. *Wray v. Evans* (1875) 80 Pa. 102. In this case the court said : "As long as Davis [the sub-contractor] continued to progress with the work, in a manner satisfactory to the engineer of the gas company, Wray had no more power over the work than an entire stranger. Had he volunteered advice as to the care necessary to preserve the public from danger, it would have been to no purpose, as he had no power to enforce it. The matter was out of his hands ; he could not assume the control of the work until the sub-contract should be forfeited by non-performance."

See also *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461, where clause (9) of the contract, as set out in § 14 note (*c*), was held not to negative the independence of the contract.

In *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352, a provision reserving a power to annul the contract was also treated as immaterial.

In *Blumb v. Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, the court rejected the contention that a conditional clause of this description was to be construed in such a sense, that the defendant might be declared liable, as a matter of law, if its agent should be notified that the contractor's men were doing a part of the work in a negligent manner.

work is to be done on the premises of the contractee, it may be laid down, as a general rule, that, whenever it is understood, or expressly provided, that the possession and control of those premises is to be surrendered to the contractor, while the work is in progress, the independence of the contract should be inferred, as a matter of law, unless there is some specific evidence which points to the opposite conclusion (a). In order that the employer may

(a) Two of the classes of cases in which the rule of respondeat superior is not applicable are thus specified in a Michigan case: (1) Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confided to the employé. (2) In case of a like contract, the contract prescribing the mode of its execution, when possession of the property is surrendered to the employé to enable him to execute the contract. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

In a Georgia case the court laid it down that the owners "relieved themselves of all responsibility in the matter by making an absolute surrender for the time being of their possession of the building, and placing it under the complete control of independent contractors." *Butler v. Lewman* (1902) 115 Ga. 752, 4, 2 S.E. 98.

"The employment of the contractor is, in its nature, just as independent of the will of the owner, as the ordinary conduct of the tenant; and when the contract is for the construction of an entire building, the ground upon which the building is to be erected, is just as truly in the occupation of the contractor, as the ground covered by a lease is in the occupation of the tenant. The possession, as necessary to the prosecution of the work to which the contract relates, is just as certainly vested in the contractor, by force of his contract, as the possession of demised premises is vested in the tenant, by force of his lease. It is said that the owner, whenever he may please, in the mere exercise of his own will, may remove the contractor from the possession, but if this power belongs to him as owner—which we neither affirm nor deny—it is not a power which he is bound to exercise, or can be justified in exercising, unless the known misconduct of the contractor has been such as to render its exercise a positive duty; and until it is exercised, the possession of the contractor is the possession of the owner, only in the same sense in which the possession of a tenant is, in judgment of law, that of his landlord. In each case, the possession is derived from the owner, and is held in subjection to his paramount title, but in both, the possession, so long as it continues, is exclusive. In our opinion, therefore, there is no reason whatever for holding that the responsibility of the owner for injuries to third persons during the continuance of this possession is greater in the one case than in the other." *Gilbert v. Beach* (1855) 4 Duer, 423.

In *Rome & D.R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94, the court was equally divided in opinion upon the question, whether undisputed evidence to the effect that the tortfeasor was engaged in building the road, and was in possession of, and using the engine and cars, for the transportation of rails and cross ties and of freight and passengers, and that he employed and paid the workmen, was prima facie sufficient to show that the tortfeasor was independent contractor.

Where a company operated a coal mine, and for convenience in shipping laid and kept in repair a railroad track from its shaft to the railroad, a distance of three quarters of a mile, the product of the mine being carried by said railroad company in trains operated by its own employés, the court, after laying it down that the relation of the mining company to the railroad company was that of shipper to carrier, said: "If there is a single circumstance which for a moment might seem to distinguish it, as shown in this case, from its purest form, it is that the shipper provided a portion of the carrier's facilities for the performance of its proper work, and a very important portion, namely, a railroad track for the short distance mentioned. This circumstance, however, does not so distinguish

escape liability on the ground of his having surrendered possession of his premises, it is merely necessary to show that the possession given was such as would enable the contractor to carry out the contract. He is not required to prove that the possession was exclusive (b). But testimony to the effect that a person employed

it even in appearance ; for the shipper surrendered this track to the carrier for the time and purpose required, and the latter then had it as fully and exclusively as if it had been its own." *Coal Run Coal Co. v. Strawn* (1884) 15 Ill. App. 347.

The defendants sold at public auction the building materials of a house then standing. By the terms of sale the building materials became the property of the purchaser who contracted under a penalty to pull them down and cart them away within two months, leaving the site cleared to the satisfaction of the vendor. One B. became the purchaser for the sum of £10. In pulling down the house he negligently caused injury to the adjoining house by throwing bricks and rubbish on to it, and omitting to prop it up while the work was in progress. By Stowell, Ch.J., and Cowen, J., it was held that the contract was essentially one of sale which transferred to B. for the time being the ownership of the house, and that, while he was engaged in the demolition and removal of the building, he, and he alone, had all the responsibilities incident to ownership. By Stephen, J., it was considered that the essential effect of the contract was that the contractor agreed to pull down the house and take away the materials, and that the sale and purchase of the materials was simply an incident in the contract, and the method of paying for the work done. The conclusion at which he arrived, therefore, was that the defendants were liable, for the reason that the contract was one likely to be dangerous to the adjacent owner. *Byrnes v. Western* (1896) 17 New So. Wales L.R. 80.

In a case where the masonry and wood work of a building was let to contractors, but in respect to the remainder of the work, including the making of the excavations for cellars, areas and coal vaults, there was no evidence tending to show that it was performed under the direction or control of any one except the owner himself, and there was neither any stipulation giving the contractors the occupancy, possession, or control of the premises, nor any other evidence on the record which tended to show that they had, or were entitled to have, such occupancy, possession, or control, it was held that a requested instruction to the following effect was abstract, and had therefore been properly refused : " If the jury find from the evidence that the defendants had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the material on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or non-compliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors or any of their employes in not guarding the said area with proper protections or coverings." *Hanner v. Whalen* (1892) 49 Ohio St. 69, 14 L.R.A. 828, 29 N.E. 1049.

In *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334 (§ 12, note subd. (2), ante), and *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272, Rev'g (1895) 60 Ill. App. 587, the fact that the defendant had surrendered the possession of the premises was specified among the elements which negatived his liability.

(b) *Mohr v. McKensie* (1895) 60 Ill. App. 575; *Geist v. Rothschild* (1900) 90 Ill. App. 324.

In a case where the owner of a building employed a contractor to make an excavation in the sidewalk in front of it, the jury were instructed that the mere fact that the owner remained in the possession of the building itself did not establish the fact of his control of the place where the excavation was made. *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875.

to erect a building was given possession of the premises in question will be disregarded, if it appears from the rest of the facts established that he was acting as the employer's superintendent, and merely occupied the premises as mechanics usually do when making improvements (c).

(b) *Control retained*.—It is clear that the torts of the person employed cannot be imputed to the employer on the mere ground that, while the work was in progress, the latter retained with respect to his premises that ultimate right of control which is an inseparable incident of proprietorship (d). This doctrine, indeed, is taken for granted in a large number of the cases cited in § 12, ante. It is equally clear, that the employer's reservation of a right to go on to the premises to see that the work is done according to the plans and specifications, does not change the relation of the parties. Under such circumstances the person employed still remains in possession of the premises, and continues

It is error to charge the jury, that, in forming an opinion as to whether the employé was a servant or an independent contractor they should inquire, whether the contract "gave exclusive use and right to the contractor over the place," and how long this exclusive use and right were to continue. *Conlin v. Charleston* (1868) 15 Rich. L. 201.

Discussing the contention that the right reserved by a railroad company to run its trains over the bridge during its construction by a contractor destroyed the independence of the employment, the Court remarked that this amounted to the assertion of the doctrine, that a railroad company or private individual cannot, in the one case, build its road or other structures, or repair either, and in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that, if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any agent or servant of the contractor. "The recognition of any such principle," it was declared, "would not only lead to the most absurd results, but would be to foster gross injustice and oppression. In every such case the question is, not whether the owner or proprietor retained any use of the property during the erection of the work, but who had the efficient control of the work contracted to be done. Such control, in cases like the present, is necessarily with the contractor: and, were it otherwise, independent employment would be degraded, its liability in a great measure destroyed, and the general efficiency of railroad service correspondingly impaired. Hence the books teem with decided cases in which the defendants were held not liable for torts committed on their premises by contractors, or their agents or servants, although there had not been an entire surrender of the possession of the premises to the contractor." *Bibb v. Norfolk & W.R. Co.* (1891) 87 Va. 711, 14 S.E. 163.

(c) *Samym v. McClosky* (1853) 2 Ohio St. 536. The Court said: "Dignifying a mere license thus to occupy, by calling it a surrender of possession, will not serve to avoid responsibility."

(d) That the contract is not the less an independent one, because the employer has that power of interference which is derived from "that reversionary right which is necessarily reserved to every owner of land" was remarked, arguendo, in *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571.

Compare also the remarks of the Court in *Gilbert v. Beach*, note (a), supra.

to perform the work under his contract, and not under the directions of the employer (*e*). But the precise significance of evidence that the employer retained over his premises those powers of control which are ordinarily associated with actual possession is a point which is left by the authorities in some obscurity. In Illinois the doctrine seems to have been adopted that this situation is incompatible with any other conclusion than that the person employed was a servant (*f*). The more correct theory, however, would seem to be, that such evidence constitutes at the very most an element to be considered by the jury. There is no such intimate or invariable connection between the power of controlling the details of the work and the power of controlling the premises on which the work is done, that the exercise of the latter power necessarily implies the exercise of the former power also. It seems certain at all events that, in cases where only a portion of the premises is affected by the performance of the work, the fact that the employer retained control over them is inconclusive, if not wholly immaterial (*g*).

(*e*) *Pfau v. Williamson* (1872) 63 Ill. 16.

(*f*) Where the landlord of a leased building employed a carpenter to put in three or four skylights for which he was to be paid so much a piece, and the goods of a tenant were injured through his negligence in removing the roof, and allowing the rain to get through, the court said that, while doing the work, the carpenter could only be regarded as the servant of the landlord. The fact that the carpenter testified he had the entire control of the work, could not make any difference, as there was no such surrender of the entire possession of the premises to the workmen as could relieve the landlord of responsibility. *Glickauf v. Maurer* (1874) 75 Ill. 289, 20 Am. Rep. 238.

Where the goods of a tenant were injured by the negligence of the servant of a person employed by the landlord to make some changes in the plumbing, the court said that, as the terms of the employment were not given, it must be assumed that no special terms were agreed on, and stated its conclusion as follows: The negligent person "was employed generally to do the required work, and was for that purpose the agent or servant of his employer. Possession or control of the building or plumbing or any part of it was not given to him. His employer had the right to control and direct the entire work and might have discharged Ruh [the plumber] from the employment if he refused to obey her instructions." *Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491.

It will be observed that, in both the cases cited the facts are analogous to those presented by the decisions collected in § 23, ante, and that the decisions might have been based upon the doctrine there applied.

(*g*) In *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004, the employer was held not to be liable for the negligence of the servants of a contractor for the repair of his chimneys, although he had retained the right of control over the premises.

In *Mumby v. Bowden* (1889) 25 Fla. 454, 6 So. 453, the court proceeded on the theory that, in order to relieve the employer of liability, it must appear that the contractor had control of the work as well as of the premises.

In a case where the plaintiff fell over cleats which had been negligently nailed to a staircase, it was held that the fact that the owner of the building

29. —the footing on which the compensation of the employé is calculated.—The remuneration of a servant is ordinarily calculated with reference to the period during which he has been in the employment of his master, while an agreement with an independent contractor commonly provides that he is to be paid a definite sum upon the completion of the entire work, or that he is to receive a certain compensation measured by the quantity of work actually done by him (*a*). It is well settled, however, that these different methods of payment, although they are usually the concomitants of the relations thus specified, are not so closely and essentially connected therewith, that the character of the contract can be inferred as a matter of law from the adoption of one or other method in the given instance (*b*). On the one hand

retained possession thereof, together with the use of the stairway after it was in a condition to be used, was immaterial. *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

(*a*) The following are a few of the many cases which might be cited for the purpose of showing that payment for the whole work by a specific sum is one of the ordinary incidents of an independent contract. *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Lawrence v. Shipman* (1873) 39 Conn. 586; *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249; 32 S.E. 92; *Peyton v. Richards* (1856) 11 La. Ann. 62; *Connors v. Hennessey* (1873) 112 Mass. 96; *Long v. Moon* (1891) 107 Mo. 334, 17 S.W. 810; *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590; *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113.

Examples of cases in which the contract was held to be independent and in which the work was to be paid for by the piece are the following: *Black v. Christ Church Finance Co.* [1894] A.C. 48, 63 L.J.P.C.N.S. 32, 6 Reports, 394, 70 L.T.N.S. 77, 58 J.P. 332; *Shaw v. West Calder Oil Co.* (Sc. Ct. of Sess. 1871) 9 Sc. L.R. 254; *Smith v. Belshaw* (1891) 98 Cal. 427, 26 Pac. 834; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998; *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376; *Knowlton v. Hoit* (1892) 67 N.H. 155, 30 Atl. 346; *Ferguson v. Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544; *Benedict v. Martin* (1862) 36 Barb. 288; *Blattenburger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

As elements tending to show the independence of the contract, the facts that no provision was made as to the payment for the services rendered, and that the compensation is dependent upon the value thereof, were mentioned in *Hexamer v. Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

A not uncommon footing on which the compensation of an independent contractor is computed is that of a percentage on the cost of the labour. See, for example, *Hale v. Johnson* (1875) 80 Ill. 185; *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N.E. 242.

(*b*) "The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment." *Atlantic Transp. Co. v. Coneys* (1897) 28 C.C.A. 388, 51 U.S. App. 570, 82 Fed. 177.

"In the books diverse rules for pronouncing upon this question [i.e. whether or not an employé was a servant] have been stated, but I must say not always with definiteness and perspicuity. Some lay it down that the manner of paying for the work or the thing done, whether by the day or job, is the rule; but this is not so; that is a circumstance to be considered, but not the criterion." *Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63.

therefore, it has been laid down in numerous cases that, where it is apparent from the remainder of the evidence that the person employed was subject to the employer's control in respect to the means by which the work was to be accomplished, the fact that his compensation was to be determined with reference to the amount of work which he might actually accomplish will be treated as immaterial. In other words, an employé is none the less a servant because he is to be paid by the piece or job, and not by wages or salary (c).

That the mode of payment is a circumstance in determining whether one is an independent contractor or a servant of another, but is not decisive, was declared in *Indiana Iron Co. v. Cray* (1897) 19 Ind. App. 565, 48 N.E. 803.

An instruction based on the theory that the mode of payment is a decisive circumstance was held erroneous in *New Orleans & N. E. R. Co. v. Reese* (1884) 61 Miss. 581, where the statement disapproved was to the effect that a contract with a railroad company to complete an abandoned construction job, the agreement being that the contractor was to be paid what the labour and material to be furnished by him should cost, and ten per cent. additional, as compensation, made the contractor servant of the company so as to render it liable for his trespass in taking trees from the land of a third party.

In *Shea v. Reems* (1884) 36 La. Ann. 966, where it was laid down that the Louisiana Code ordinarily infers the power of control and discharge from the payment of wages, this was declared to be the common law rule also. This statement is, we think, too sweeping. The most that can be said, having a due regard to the general trend of the authorities, is that the payment of wages is a circumstance from which a jury would be justified in inferring the relation of master and servant, if there should be no antagonistic evidence pointing decisively to the opposite conclusion.

(c) "No distinction can be drawn from the circumstance of a man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee." *Sadler v. Henlock* (1855) 4 El. & Bl. 570, 3 C.L.R. 760, 1 Jur. N.S. 677, 24 L.J.Q.B N.S. 138, 3 Weekl. Rep. 181.

To the same effect, see *Tennessee Coal, Iron & R. Co. v. Hayes* (1892) 97 Ala. 201, 12 So. 98; *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442; *Harris v. MacNamara* (1892) 97 Ala. 181, 12 So. 103; *St. Clair Nail Co. v. Smith* (1890) 43 Ill. App. 105; *Holmes v. Tennessee Coal, Iron & R. Co.* (1897) 49 La. Ann. 1465; 22 So. 403; *Waters v. Pioneer Fuel Co.* (1892) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N.W. 52; *Whitson v. Ames* (1897) 68 Minn. 23, 70 N.W. 793 (case should have been submitted to the jury, as there was some evidence of the exercise of control); *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S.W. 764; *Rummell v. Dilworth P. & Co.* (1885) 111 Pa. 343, 2 Atl. 355, 363; *Huff v. Watkins* (1880) 15 S.C. 85, 40 Am. Rep. 680; *Richey v. DuPre* (1883) 20 S.C. 6; *Dagenais v. Houle* (1897) Rap. Jud. Quebec 11 C.S. 225.

In cases arising under the embezzlement statutes, the fact that a person employed to solicit orders for a commodity is paid by commission does not negative the inference that he is a servant. *Rex v. Carr* (1811) Russ & R.C.C. 198; *Reg. v. May* (1861) Leigh & C.C.C. 13, 30 L.J. Mag. Cas. N.S. 81, 7 Jur. N.S. 147, 3 L.T.N.S. 680, 9 Weekl. Rep. 256, 8 Cox C.C. 421; *Reg. v. Tite* (1861) Leigh & C.C.C. 29, 30 L.J. Mag. Cas. N.S. 142, 7 Jur. N.S. 556, 4 L.T.N.S. 259, 9 Weekl. Rep. 554, 8 Cox C.C. 458; *Reg. v. Bailey* (1871) 12 Cox C.C. 56, 24 L.T. N.S. 477; *Singer Mfg. Co. v. Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

The existence of independent sub-contracts with the persons who performed various distinct kinds of work for the principal contractor will not be inferred

On the other hand, it is equally well settled that the fact of its being provided by the agreement that the person employed is to be paid for his services with reference to the period during which the work should continue, although it may carry some weight in doubtful cases, is an indecisive element in cases where the evidence, as a whole, points clearly to the conclusion that he was an independent contractor (*d*). Nor has the fact that there was no express stipulation as to the amount to be paid for the work any tendency to show that a contract was not an independent one (*e*).

80. —the pecuniary circumstances of the person employed.—In one case the fact that the alleged contractor was financially irresponsible was specifically mentioned among the elements which tended to negative the conclusion that he was an independent contractor (*a*). That this fact is one which may properly be considered as having a distinct bearing upon the nature of the relation between the parties is a doctrine which may be said to receive a certain amount of indirect support from those decisions also in which, (see § 22, ante) the existence of a contract of hiring and service was inferred from the character of the work and the industrial status of the workman; for in all of them it may reasonably be assumed that the pecuniary resources of the person employed were extremely limited.

from the mere fact that they were paid by the piece. *Allen v. Willard* (1868) 57 Pa. 374.

The mere fact that a coal miner is paid a certain amount for each ton of coal taken out by him does not constitute him an independent contractor in such a sense that he is exempt from the provisions of this Act. *Outrine Hewitt Coal Co. v. Gregory* (1903) 28 Vict. L.R. 586.

(*d*) *Corbin v. American Mills* (1858) 27 Conn. 274, 71 Am. Dec. 63; *Geer v. Darrow* (1891) 61 Conn. 220, 23 Atl. 1087; *Wadsworth Howland Co. v. Foster* (1893) 50 Ill. App. 513, Affirmed in (1897) 168 Ill. 514, 48 N.E. 163; *Morgan v. Smith* (1893) 159 Mass. 570, 35 N.E. 101; *Harkins v. Standard Sugar Refinery* (1877) 122 Mass. 400; *Hexamer v. Webb* (1866) 101 N.Y. 377, 54 Am. Rep. 703, N.E. 755; *Butler v. Townsend* (1891) 126 N.Y. 105, 26 N.E. 1017; *Larow v. Clute* (1891) 37 N.Y.S.R. 859, 14 N.Y. Supp. 616; *Heidenweg v. Philadelphia* (1895) 168 Pa. 72, 31 Atl. 1063; *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699; *Groesbeck v. Pinson* (1899) 21 Tex. Civ. App. 44, 50 S.W. 620; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S.E. 163; *Emmerson v. Fay* (1896) 94 Va. 60, 26 S.E. 386; *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875 (in charge to jury).

In a prosecution under the embezzlement statutes the fact that men following the same occupation (drover) as the prisoner were customarily paid by the day does not prove that he was a servant. *Reg. v. Hey* (1849) 2 Car. & K. 985, Temple & M. 209, 1 Den. C.C. 602, 3 Cox C.C. 582, 14 Jur. 154.

(*e*) *Bennett v. Truebody* (1885) 66 Cal. 609, 56 Am. Rep. 117, 6 Pac. 329. See however cases cited in § 23, ante.

(*a*) *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399

31. —a provision in the contract that the employer shall be indemnified for all losses caused by the negligence of the person employed.—It is well settled that the fact of the contractor's having undertaken, as between himself and the employer, to be responsible for injuries occasioned by any tortious conduct on the part of himself and his servants does not in any way affect or qualify the position of third parties in regard to the recovery of damages from the employer. Such a stipulation enures to the benefit of the employer alone, and confers no right of action upon any one else (*a*). It does not improve the position of the plaintiff in cases where the tortious conduct was held to be merely collateral (*b*); nor does it enable the employer to escape liability, if the circumstances are otherwise such that the plaintiff is entitled to recover, as where a non-delegable duty was violated by the contractor (*c*), or where a nuisance originally created by the contractor was continued by the employer (*d*); or where the contractor was so far under the control of the employer that he was in point of law a servant (*e*).

32. —the use of the contractor's appliances by the employer.—The fact that an agent of the employer uses, for the purpose of executing a part of a work of construction which is in progress, a defective appliance belonging to a contractor who is engaged on another part of the same work will not render the employer liable for an injury caused by its condition or the manner of its operation, at a time when it is being used by, and is under the control of the contractor himself (*a*).

(*a*) *French v. Vix* (1894) 143 N.Y. 90, 37 N.E. 612; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236.

(*b*) *McCafferty v. Spuyten Duyvil & P.M.R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267; *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; *Wray v. Evans* (1875) 80 Pa. 102; *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059.

A railroad corporation is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road, or persons in their employ, although under the contract the corporation reserves the right to retain in its hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted. Such a case is not within the provisions of Rev. Stat. chap. 51, § 22 (relating to the condemnation of lands). *Tibbetts v. Knox & L. R. Co.* (1873) 62 Me. 437.

(*c*) *Dalton v. Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Weekl. Rep. 196, per Blackburn, J.; *Norwalk Gaslight Co. v. Norwalk* (1893) 63 Conn. 495, 28 Atl. 32. See § 50, post.

(*d*) *Osborn v. Union Ferry Co.* (1869) 53 Barb. 629.

(*e*) *Cooper v. Seattle* (1897) 16 Wash. 462, 47 Pac. 887, 58 Am. St. Rep. 46.

(*a*) *Hughbanks v. Boston Investment Co.* (1894) 92 Iowa, 267, 60 N.W. 640.

83. —the fact that the employer is to furnish the appliances or materials for the work.—A contract for a work of construction not infrequently provides that the appliances or the materials required for the execution of the work are to be furnished by the employer. Such a stipulation is not sufficient of itself to show that the employé is a servant (*a*).

As to the rule that the employer cannot be held responsible on the ground that, while they were being used by the contractor, the appliances or materials furnished became the means or agency by which the injury in suit was inflicted, see § 39, notes (*f*), (*g*) post.

84. —the fact that the stipulated work constituted part of the employer's regular operations.—It has been laid down that, in determining the question, whether a person who undertook the performance of a specific job for a certain price should be regarded as a mere servant, it does not matter what kind of work was the subject of the contract, or whether it was or was not a portion of the regular work which the party contracting for it was carrying on, or some piece of work incidentally connected with it as necessary or convenient. The court added that such an agreement is to be distinguished for a mere arrangement for the compensation of personal services by the piece instead of by the day (*a*). The statement here made is opposed to the weight of authority, so far as it asserts the immateriality of the nature of the work to which the contract relates (see § 22, ante), but is otherwise unobjectionable.

85. —a provision prohibiting the use of the employer's name.—A provision in the contract with the person employed, that he shall not use the name of his employer in any manner whereby the public or any individual may be led to believe that such employer is responsible for his actions, does not in any degree relieve the employer of liability for his negligence, if, as a matter of fact, the other provisions of the contract show that he is a servant, and not an independent contractor (*a*).

(*a*) *Fuller v. Citizens' Nat. Bank* (1882) 15 Fed. 875 (in charge to jury).

(*a*) *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100 (contract to break down rock in a mine at a certain price per foot).

(*a*) *Singer Mfg. Co. v. Rahn* (1889) 132 U.S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

36. —the fact that the contractor was a director of an employing company.—In an action brought by an injured servant, it was held by the Superior Court of the City of New York that, where a railway company employs one of its directors to construct the floor of a building by day's work, and paid him a commission on the actual cost of the work, he is, as regards the performance of such works, a mere contractor, and that notice to him of any defect in the instrumentalities is not notice to the company (*a*). The rule thus adopted is doubtless a proper one in any case in which the injured party was chargeable with knowledge of the actual relations between the company and the director. But under the general principles of the law of agency, it seems clear that a person who is employed by a director to assist in doing work which is for the benefit of the company has a right to assume that the director is acting as the representative for the company. Such is the doctrine of the Supreme Court of Kansas (*b*). In the case cited it was remarked that possibly a different rule might obtain in regard to parties who had no contractual relations with the work. This point does not seem to have ever been judicially discussed ; but it is not easy to see any satisfactory ground upon which such a distinction could be based. A stranger, it would seem, is not less entitled than a servant to the benefit of the presumption that, as regards any matter which falls within the scope of his powers, a general agent really occupies that position.

37. —the virtual identity of an employing and contracting company.—One of the grounds on which a recent decision in favour of the plaintiff was based was, that the injury had been caused by the negligence of a construction company which had been organized for the express purpose of carrying out the work in question, and that this company and the one from which damages were claimed were controlled and managed by the same persons (*a*). There is

(*a*) *Dillon v. Sixth Ave R. Co.* (1882) 16 Jones & S. 283.

(*b*) *Solomon R. Co. v. Jones* (1883) 30 Kan. 601, 2 Pac. 657 (work was undertaken by the president of the company).

(*a*) *Chicago Economic Fuel Gas Co. v. Myers* (1897) 168 Ill. 139, 48 N.E. 66. Affirming (1896) 64 Ill. App. 270 (injury caused by an explosion of gas while being conveyed through carelessly constructed pipes). The evidence relied upon by the Court, as sustaining its conclusion, was that all the officers and employes of the construction company who testified in the case, were either at the same time connected in some way with the defendant company, or passed alternately from the service of one to the service of the other ; that the natural gas which caused the explosion was let into the pipes by the order of the person

apparently no other instance of the application of such a doctrine. But its justice and reasonableness are so manifest, and its supplies such a simple and direct method of preventing the avoidance of liability by the subterfuge of creating "dummy" corporations, that the present writer has no hesitation in expressing the hope that it will meet with general acceptance.

88. Provinces of court and jury.—If the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court, as a matter of law (*a*). It has, however, been held that this rule is not applicable, where the nature of the relation between the employer and the person employed depends upon the meaning of a written instrument collaterally introduced in evidence, and the effect of that instrument depends, not merely upon its construction, but upon intrinsic facts and circumstances. The inferences of fact to be drawn from the instrument, must, in such a case, be left to the jury (*b*).

If no written contract has been executed, the character of the relation between the parties is a question for the jury, where the evidence with respect to the essential and determinative facts is conflicting (*c*), or is such that different deductions may reasonably be drawn from it (*d*). On the other hand, the effect of the contract

who acted as president of both companies; and that he was unable to state whether he gave such order as the president of the gas company, or as the supervising engineer of the construction company. It was considered to be just as legitimate to suppose, that he gave the order in the former of these capacities, as that he gave it in the latter capacity.

(*a*) *Linnehan v. Rollins* (1884) 137 Mass 123, 50 Am. Rep. 287; *Scott v. Springfield* (1899) 81 Mo. App. 312; *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N.E. 17; *Foster v. Chicago* (1902) 197 Ill. 264, 64 N.E. 322. Affirming (1900) 96 Ill. App. 4; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Potter v. Seymour* (1859) 4 Bosw. 140; *Rogers v. Florence C. Co.* (1889) 31 S.C. 379, 9 S.E. 1059.

The general rule of evidence thus applied is, that the construction of all written documents belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have ascertained as facts by the jury. Taylor, Ev. § 43; Greenl., Ev. § 277.

(*b*) *McNamee v. Hunt* (1898) 30 C.C.A. 653, 59 U.S. App. 9, 87 Fed. 298.

(*c*) *Forsyth v. Hooper* (1865) 11 Allen 419.

(*d*) *Goldman v. Mason* (1888) 18 N.Y.S.R. 376, 2 N.Y. Supp. 337; *Kellogg v. Payne* (1866) 21 Iowa, 575; *Rome & D.R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94; *Carlson v. Stocking* (1895) 91 Wis. 432, 65 N.W. 58 (see § 12, note, subd. 16); *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, 41 N.Y. Supp. 99 (see § 19, note (*a*), subd. (9); *Daley v. Boston & A.R. Co.* (1888) 147 Mass. 107, 16 N.E. 690 (see § 21, note (*c*), subd. (1); *Dane v. Cochrane Chemical Co.* (1895)

is to be determined by the court, where its terms are established by undisputed or clearly preponderating evidence, from which only a single inference can fairly be drawn (*e*).

III. FOR WHAT TORTS OF CONTRACTORS THE EMPLOYER IS NOT BOUND TO ANSWER.

89. Generally.—If it is conceded or established that the tortfeasor was an independent contractor in the sense explained in the foregoing sections, the non-liability of the employer becomes an inference in point of law, if the only reasonable deduction from the circumstances as shewn is, that the injury in question resulted approximately and solely from the negligent manner in which the stipulated work was performed, or from a wrongful act which was neither a necessary, nor a probable incident of that work (*a*). The

164 Mass. 453, 41 N.E. 678 (see § 23, note (*a*)); *Wallace v. Southern Cotton Oil Co.* (1897) 91 Tex. 18, 40 S.W. 399 (see § 19, note (*a*), subd. 9); *Sullivan v. Dunham* (1898) 35 App. Div. 342, 54 N.Y. Supp. 962 (see § 21, note (*c*), subd. 4); *Prairie State Loan & T. Co. v. Doig* (1873) 70 Ill. 52 (see § 12, note (*b*), subd. 2); *Brophy v. Bartlett* (1888) 1 Silv. Ct. App. 575 (see § 12, note (*b*), subd. 13).

In a case where a piece of the scaffolding used by masons fell on a passer-by, it was held that a witness should not be permitted to testify that "he hired the men to work for" certain persons; that he "had no control of anything." His testimony should be confined to a narrative of what happened in the making of his contracts, and the conduct of the work, and from this the jury are to draw their conclusions. *Alexander v. Mandeville* (1889) 33 Ill. App. 589.

(*e*) This principle is explicitly enounced in *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442, and is taken for granted in many of the cases cited in §§ 12, 18, 21.

In *Deford v. State* (1868) 30 Md. 179, it was laid down that, where there is no written contract, the terms and manner of the employment are matters for the jury, and that it is for the court to declare, in view of the facts established, what was the relation between the parties.

In *Emmerson v. Fay* (1896) 94 Va. 60, 26 S.E. 386, it was laid down broadly that what constitutes an independent employment is a question of law, to be decided upon the facts, as proved.

(*a*) "Where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for there the maxim 'qui facit per alium facit per se' applies; but where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists." *Butler v. Hunter* (1862) 7 Hurlst. & N. 82, 631 L.J. Exch. N.S. 214, 10 Weekl. Rep. 214, per Pollock, C.B.

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, where the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'colateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do." Rigby, L.J., in *Hardaker v. Idle Dist. Council* (1896) 1 Q.B. 352, 65 L.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196.

When the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskillful or improper person as the contractor. *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N.J.L. 17, 10 Am. Rep. 205.

term commonly used for the purpose of describing tortious conduct of this character is "collateral" (b). Another word which conveys

"For negligences of the contractor, not done under the contract but in violation of it, the employer is in general not liable." *Lawrence v. Shipman* (1873) 39 Conn. 586.

In a case where a contractor had omitted to close an opening over an area, the court said: "We are, for these reasons, of the opinion that the true rule in cases of this character is, if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable, but if it is from the negligence of the contractor or his servants, that he should alone be responsible." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

The employer is not liable where the injury was caused by "the manner in which the contractor managed the details of the work." *Hauser v. Metropolitan Street R. Co.* 27 Misc. 538, 58 N.Y. Supp. 286.

The conception of an injury which was the result of the manner in which the contract was performed is also explicitly adverted to in *Skute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

Other forms of words which may be used to express of the same general conception are suggested by the following phrases:

"A wrongful act of commission by a contractor beyond the scope of his employment." *Gray v. Pullen* (1864) 5 Best. & S. 970, 984, 34 L.J.Q.B.N.S. 265, 11 L.T.N.S. 569, 13 Weekl. Rep. 57, per Erle, Ch. J.

A "wrongful act unnecessarily done" by the contractor in the performance of his work. *Upton v. Townend* (1855) 17 C.B. 30, 71, 25 L.J.C.P.N.S. 44, 1 Jur. N.S. 1089, 4 Weekl. Rep. 56, per Willes, J.

Acts which were "unnecessary to the accomplishment of the work, and in no way connected with its proper performance." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334; or which "did not necessarily occur as an incident to the prosecution of the work." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334; or which did "not necessarily arise" out of the work contracted for. *Chicago City R. Co. v. Hennissy* (1884) 16 Ill. App. 153.

An accident "caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do." *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 772, 57 N.E. 1004.

In a case where the evidence is susceptible of the construction that the person employed was exercising an independent employment under the contract, it is error to refuse a charge to the effect that, if the accident was the result of the negligence of that person or of his servants, the employer is not liable. *Potter v. Seymour* (1859) 4 Bosw. 140.

(b) "Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default." *Mersey Docks & Harbour Board v. Gibbs* (1864) L.R. 1 H.L. 93, 11 H.L. Cas. 686, 35 L.J. Exch. N.S. 225, 12 Jur. N.S. 571, 14 L.T.N.S. 677, 14 Weekl. Rep. 872, per Blackburn, J.

In a later case the same judge (then a member of the House of Lords), observed "Ever since *Quarman v. Burnett* (1840) 6 Mees and W. 499, 9 L.J. Exch. N.S. 308, 4 Jur. 969, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants." *Dalton v. Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T. & S. 844, 30 Weekl. Rep. 196.

The same word is also used in the following cases, *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 30 L.J. Exch. N.S. 81, 3 L.T. & S. 750, 9 Weekl. Rep. 274; *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L.J. Exch. N.S. 214, 10 Weekl. Rep. 214; *Hardaker v. Idle Dist. Council* (1896) 1 Q.B. 352, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196; *Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630; *Frassi v. McDonald* (1898) 122 Cal. 400, 55 Pac. 139, 772; *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395; *Sanford v. Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

a similar meaning, but which is found less frequently in the reports, is "casual" (*c*). Occasionally those two epithets are combined in the same statement (*d*).

In some instances the language used is indicative of the conception, that no causal connection between the letting of the contract, and the injury can be said to exist, where that injury resulted solely from the tortious act of the contractor (*e*). To establish such a connection it is not enough to show that the employer supplied one or more of the instrumentalities which were necessary for the execution of the stipulated work. It does not follow that, because those instrumentalities were capable of being so used as to constitute a nuisance, or of being used in an improper, negligent, or mischievous manner, an injury of which it is an efficient cause must therefore be regarded as a natural consequence of the permission to use it. The extent of the authority conferred by the employer is, to execute the contract by a proper and reasonable use of any means and appliances which he furnishes (*f*). Nor can the liability of an employer for the

(*c*) *Hardaker v. Idle Dist. Council* [1896] 1 Q.B. 335, 65 L.J.Q.B.N.S. 363, 74 L.T.N.S. 69, 44 Weekl. Rep. 323, 60 J.P. 196; *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56; *Wilson v. White* (1883) 71 Ga. 506, 51 Am. Rep. 269.

(*d*) See, for example, *Holliday v. National Teleph. Co.* [1899] 2 Q.B. 392, 400, 68 L.J.Q.B.N.S. 1016.

(*e*) Thus we find it laid down that the employer is not liable, where the execution of the work did not entail the injury in question as a "natural or necessary" consequence. *O'Rourke v. Hart* (1860) 7 Bosw. 511, (1862) 9 Bosw. 30; as a "natural result"; *Knowlton v. Hoit* (1891) 67 N.H. 155, 30 Atl. 346; *Carter v. Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572; *Fuller v. Grand Rapids* (1895) 105 Mich. 529, 63 N.W. 530; as a "probable" consequence; *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56; or as a "necessary consequence"; *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209.

(*f*) The fact that the materials for paving a highway were brought to the required spot by the principal contractor for the work will not render him liable for the negligence of a sub-contractor in leaving a portion of those materials in such a position as to obstruct the highway. *Overton v. Freeman* (1852) 11 C.B. 867, 3 Car. & K. 52, 21 L.J.C.P.N.S. 52, 16 Jur. 65, citing *Knight v. Fox* (1850) 4 Exch. 721, 20 L.J. Exch. N.S. 9, 14 Jur. 963.

In *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36 Atl. 998, where the plaintiff's mill was burnt by fire communicated from the stove of a cooking car occupied by a man who had contracted to supply cordwood to a railway company, it was sought to charge the company with liability on the ground that, inasmuch as it had, for the purpose of enabling the contractor to do his work conveniently, placed this and other cars on a siding close to the mill, the mischief complained of was not the negligent act of the contractor or his servants, but the direct result from using an appliance located by defendant;—that the proxima causa was the location of the car,

careless management of an appliance be inferred from the mere fact that there was an understanding between him and the contractor that such appliance was to be used (*g*).

A complaint is demurrable if the facts declared upon show that the injury for which damages are sought was caused by the negligent manner in which the contractor executed the work in question, unless some allegation also discloses that there was a misfeasance or malfeasance on the part of the employer, which caused the contractor to do the work negligently, and that the origin of the injury complained of can therefore be traced to the action of the former in setting in motion the immediately efficient cause of the wrong (*h*).

the use of which naturally would and did cause the damage. This contention was rejected by the court, which said: "The act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant. The latter, of the contractor. The car itself was harmless, and its location, when unused, threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless. . . . True, there might be cases where the land-owner would be liable if the use was contrived by him for the purpose of mischief, with intent of avoiding liability; but there is no element of that sort here. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant. It did not create or maintain a nuisance, nor a condition that directly caused the mischief. That was perhaps caused from the misuse, by another, of the conditions created by defendant, for whose acts defendant is in no way responsible. . . . The act complained of in the case at bar was locating a car upon the employer's land, an act not dangerous to any one. Its use might, or might not be. A dangerous use was not contracted for."

To the same general effect, see *Carter v. Berlin Mills Co.* (1876) 58 N.H. 52, 42 Am. Rep. 572 (plaintiff's land was flooded owing to the improper use of defendant's dam by a logging contractor).

The fact that certain appliances or materials were furnished by the employer is treated as immaterial in the following cases among others. *Murray v. Currie* (1870) L.R. 6 C.P. 24, 40 L.J.C.P.N.S. 26, 23 L.J.N.S. 557, 19 Weekl. Rep. 104; *Corbin v. American Mills* (1858) 27 Conn. 275, 71 Am. Dec. 63; *Miller v. Minnesota & N.W.R. Co.* (1888) 76 Iowa 655, 14 Am. St. Rep. 258, 188; *Mayhew v. Sullivan Min. Co.* (1884) 76 Me. 100; *Harris v. McNamara* (1892) 97 Ala. 181, 12 So. 103; *Deford v. State* (1868) 30 Md. 179; *Benedict v. Martin* (1862) 36 Barb. 288; *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113; *Emmerson v. Fay* (1896) 94 Va. 60, 26 S.E. 386.

(*g*) In *Bailey v. Troy & B. R Co.* (1884) 57 Vt. 252, 52 Am. Rep. 129, where the plaintiff's horse was frightened by a steam-shovel and ran away, the court disapproved of an instruction contravening the principle stated in the text, saying: "If the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson [the contractor], he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work, does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel."

(*h*) *White v. New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454, where one of the allegations of the complaint set up that the cause of the in-

In the following sections the cases in which various kinds of collateral negligence are involved, have been arranged in such a manner as to facilitate comparison and contrast with those in which recovery has been allowed on one or other of the various grounds discussed in the succeeding subtitles of this monograph. It is deserving of notice that, in not a few instances, the result of determining the rights of the parties with reference to different principles has been the rendition of conflicting decisions with regard to virtually identical facts.

40. Negligence not productive of permanently dangerous conditions.—In the subjoined notes are collected the decisions which illustrate the circumstances under which actions have been held not to be maintainable for the consequences of negligent acts which are sporadic in their nature and of brief duration, (a).

juries complained of was the neglect of a contractor for the grading of a street to see that the surface water, sewage and drainage, whenever it should accumulate, through being impeded by reason of the grading of Ninth avenue, should have a sufficient outlet and be discharged and carried off.

A demurrer should be sustained to a declaration which alleges substantially that the plaintiff's intestate B. was employed as workman by one W. who had contracted with the defendant to dig lime rock for him by the cask in a certain quarry; that it then and there became the legal duty of the defendant, while B. was at work for the said W., to see that the walls of said quarry were examined from time to time in order to ascertain if any loose rock was likely to fall upon the said B.; that the defendant negligently permitted the said W. to excavate rock in the walls of the quarry in such a manner as to render the walls on one side thereof unsafe for the said B. to work therein; that the death of the said B. was caused by the negligence of the defendant in not providing suitable appliances for the purpose of ascertaining the condition of the quarry, as aforesaid, and in permitting the dangerous condition of the quarry to exist while the said B. was lawfully at work therein. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663.

(a) (1) *Work on Railways.*—The liability of the defendant company has been denied under the following circumstances:

Where the injury resulted from the negligent management of a train, used and controlled by contractors on a portion of the road not yet turned over to the company. *Scarborough v. Alabama M. R. Co.* (1891) 94 Ala. 497, 10 So. 316 (contractors injured by a collision); *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 17 So. 94 (brakeman injured in attempting to couple cars); *Miller v. Minnesota & N.W.R. Co.* (1888) 76 Iowa 655, 14 Am. St. Rep. 258, 39 N.W. 188 (contractor's servant injured as a result of maintaining too high a speed on an unsafe track); *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728 (brakeman on a train operated by a construction company on a line, injured by defects in the rolling stock); *Hitte v. Republican Valley R. Co.* (1886) 19 Neb. 620, 28 N.W. 284 (stranger was run over; *Houston & G. G. R. Co. v. Van Bayless* (1876) 1 Tex. App. Civ. Cas. (White & W.) 248 (mule run over), cited in *Houston & G.N.R. Co. v. Meador* (1879) 5 Tex. 77; *Meyer v. Midland P.R. Co.* (1873) 2 Neb. 319 (similar accident); *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632 (injury to passenger whose reception on the train was a violation of the express prohibition of the railway company); *Union P.R. Co. v.*

Hause (1871) 1 Wyo. 27 (in this case the plaintiff was conveyed in the caboose on a regular ticket issued by the contractor's employés).

In cases of this class it is error to give a charge to the jury, which bases the responsibility of the defendant upon the isolated fact that the contractor was transporting freight and passengers for reward on a finished portion of the line. This fact would be insufficient to warrant the inference thus drawn from it, if it should be shewn, either (1) that the contractor was operating that particular section of the road, as a means of furthering the construction of the unfinished portion, or (2) that, although the contractor might have been transporting freight and passengers under an arrangement which did not avail to exempt the company from liability for his negligence, while he was rendering that service, yet he exercised at the same time, in respect to the work of construction, an independent occupation, and was not the agent of the company while discharging the functions incident to that position. *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94.

Recovery has also been denied under the following circumstances:

Where an iron awning rail which was being moved for the purpose of obtaining more space for a street railway was let fall on a passer-by. *O'Rourke v. Hart* (1860) 7 Bosw. 511, (1862) 9 Bosw. 301.

Where workmen dropped a chain from the structure of an elevated railway on to the street below. *Burmeister v. New York Elev. R. Co.* (1881) 15 Jones & S. 264.

Where a horse was frightened by the operation of a portable steam engine used by a contractor to pump water. *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N.E. 296.

Where a plank which formed a temporary crossing was turned up by the negligence of contractor's servant in driving against it, and injured a person who had stepped on it. *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 344, 43 Atl. 215.

Where a railway car which was being drawn by horses collided with a waggon. *Schuler v. Hudson River R. Co.* (1862) 38 Barb. 653.

A railroad company, as warehouseman, is not liable for the destruction of goods by fire communicated from a pile-driving engine which was operated by a contractor engaged in repairing the company's wharf. *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S.E. 92.

(2) *Work on Buildings.*—The employer was held not to be responsible where the servant of a contractor or a sub-contractor caused injury to a person on the adjacent street or rightfully on the premises, by letting fall a tool, (*Pearson v. Coe* (1877), L.R. 2 C.P. Div. 369, 36 L.T.N.S. 495; *Fitzpatrick v. Chicago & W.I.R. Co.* (1888) 31 Ill. App. 649); or a brick, (*Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N.E. 1004; *Gardner v. Bennett* (1874) 6 Jones & S. 197; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N.Y. Supp. 236; *Neumeister v. Eggers* (1899) 29 App. Div. 385, 51 N.Y. Supp. 481; *Smith v. Milwaukee Builders' & T. Exchange* (1895) 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N.W. 1041); or a coil of rope, (*Geist v. Rothschild* (1900) 90 Ill. App. 324); or a plank, (*Long v. Moon* (1891) 107 Mo. 334, 17 S.W. 810).

The right to maintain an action was also denied, where a person walking along the street was injured by the negligence of a servant of a contractor who threw a piece of lime into a mortar bed in the street. *Strauss v. Louisville* (1900) 108 Ky. 155, 55 S.W. 1075.

And where the servant of one of the contractors engaged upon a building was injured by the negligence of another contractor's servant who dropped a tool down the elevator well. *Jehle v. Ellicott Square Co.* (1898) 31 App. Div. 337, 52 N.Y. Supp. 366.

And where a tenant sought to recover from his landlord damages for his son's death, caused by his inhaling sooty vapor which filled the room by reason of the acts of servants of a contractor engaged in repairing the chimney. *O'Connor v. Schnepel* (1895) 12 Misc. 356, 33 N.Y. Supp. 562.

And where the servant of one who had contracted to lay an upper floor in

a building pushed his foot through the ceiling of the room underneath, and so caused a large piece of plaster to fall on the occupant of that room. *Fitzgerald v. Timoney* (1895) 13 Misc. 327, 34 N.Y. Supp. 460.

A jury is properly charged that one for whom a brick wall is being erected is not liable for damage sustained by the adjoining owner by the dropping of brick and mortar on his premises, if such occurrences were not necessarily involved in the building of the wall, but were due to the negligence of the contractor or his servants. *Pye v. Faxon* (1892) 156 Mass. 471, 31 N.E. 640.

(3) *Work on Highways*.—A city is not liable for injuries resulting from the fact that a horse was frightened by the whistle of a steam-roller used by a contractor, and became uncontrollable. *Cary v. Chicago* (1895) 60 Ill. App. 341

(4) *Work Involving the Handling of Heavy Articles*.—Liability for the negligence of draymen, etc., has been denied under the following circumstances:

Where a person passing by was struck by a barrel which was being rolled along a skid to a truck. *McMullen v. Hoyt* (1867) 2 Daly 271.

Where a hogshead was thrown from a truck injured plaintiff, a man sent with the horse. *Brophy v. Bartlett* (1888) 1 Silv. Ch. App. 575, Reversing (1885) 37 Hun. 642.

Where a barrel of salt which was being delivered at the vendee's store rolled against and injured a person passing on the footpath. *DeForrest v. Wright* (1852) 2 Mich. 368.

Where the injury was caused by a truckman's negligence in rolling barrels out of his employer's store. *Riedel v. Moran F. Co.* (1894) 103 Mich. 262, 61 N.W. 509.

Where a carpenter employed upon the lower floor of a warehouse was injured through the negligence of a truckman or his employes in allowing a mass of paper to slip from the sling in which it was being raised. *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N.Y. Supp. 522.

(5) *Management of Teams*.—The principal employer is not liable where the injury was caused by the negligent manner in which a waggon belonging to a contractor engaged in doing certain hauling and delivery work was driven by his servant. *Foster v. Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N.E. 163, Affirming (1896) 68 Ill. App. 600.

(6) *Management of Vessels*.—The owner of a ship which, through the negligence of a steamboat by which it is being towed, is brought into collision with another vessel is not liable for the resulting injuries. *Sproul v. Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec. 350. (See, however, § 12a, ante).

A coal company is not liable where a contractor for the haulage of its boats on a canal so negligently operates one of them as to bring it into collision with a boat belonging to a third person. *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

(7) *Entertainments at Public Resorts*.—The proprietor of a public resort who employs an independent contractor to make a balloon ascent to attract visitors is not liable for injury to a visitor by a pole which falls because of the negligence of the balloonist, while he is endeavouring by means of a new and unfamiliar appliance to raise the pole for use in inflating the balloon. *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56. The court assigns three distinct grounds for its decision, viz.: (1) That the negligence complained of was collateral to, and not a probable consequence of the work in hand; (2) that a new method not known to the defendant, was employed; and (3) that they were no concealed dangers against which he was bound to warn visitors.

(8) *Loading or Unloading of Ships*.—A shipowner is not liable for the death of a stevedore's servant caused by the excessive rapidity with which his fellow servants passed along a gang plank a barrel which he was handling. *Rankin v. Merchants & M. Transp. Co.* (1884) 73 Ga. 229, 54 Am. Rep. 874.

40a. Same as subject continued. — Blasting operations. — One group of cases under this head, viz., those which relate to injuries caused by blasting operations it will be desirable to notice separately, for the reason that, as will be shown in later sections, the doctrine that the employer is exempt from liability under such circumstances is not accepted by all the authorities. The courts which apply that doctrine may be said to start from the fundamental principle that "one who in the reasonable use of his land blasts rocks thereon with due and proper care, is not liable for the inevitable damage caused thereby to the neighboring property" (a). If full effect be given to this principle, it is clear that cases in which a contract is entered into for the performance of work by means of blasting must stand outside the category of those in which the employer is held responsible on the ground that he contracted for work which "would necessarily produce the injuries complained of" (b), or which is "dangerous in itself" (c), or which was "intrinsically dangerous" (d). See the two following subtitles, especially §§ 46, 52. In this point of view, therefore, if an injury results from the negligent manner in which such work is performed by the contractor, his negligence is merely collateral, and not such as will affect the employer with liability (e).

(a) *Booth v. Rome, W. & O. Terminal R. Co.* (1893) 140 N.Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N.E. 592; *French v. Via* (1894) 143 N.Y. 90, 37 N.E. 612.

(b) *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267.

(c) *French v. Via* (1893) 2 Misc. 312, 21 N.Y. Supp. 1016, Affirmed in (1894) 143 N.Y. 90, 37 N.E. 612.

(d) *Schnurr v. Huntington County* (1899) 22 Ind. App. 188, 53 N.E. 425.

(e) Recovery was denied in under the following circumstances:

Where plaintiff's house was struck by a stone a result of the negligent manner in which contractor for the grading of a street carried on the blasting operations. *Kelly v. New York* (1854) 11 N.Y. 432; *Pack v. New York* (1853) 8 N.Y. 222. (In *Storrs v. Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437, Comstock, J., doubted whether the second of these cases had been correctly decided upon the facts).

And where a similar injury resulted from the negligence of a contractor engaged in excavating the foundation of a house. *French v. Via* (1894) 143 N.Y. 90, 37 N.E. 612, Affirming (1893) 2 Misc. 312, 21 N.Y. Supp. 1016; *Roemer v. Striker* (1894) 143 N.Y. 134, 36 N.E. 808 (holding that no error had been committed in allowing the defendant to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation).

And where the servants of a contractor for the construction of a railway did their work in such a manner as, by an overcharge, to cast rocks against and into the plaintiff's house near the line. *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N.Y. 178, 19 Am. Rep. 267. In the case last cited the

court said: "The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as appears, to a competent person, and had provided, in the contract, that he should be responsible for any damage occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance. Hence, if the defendant can be held liable in this case it must be upon the naked ground that it is responsible for the careless acts of the sub-contractor's servants over whom it had no control. There is no authority in this State for imposing such a liability under such a state of facts." In this case *Dwight, C.*, delivered a very elaborate and able dissenting opinion from which some extracts have been quoted in another section, (46, note(g), post), and the decision was expressly disapproved in *Weatherbee v. Partridge* (1899) 175 Mass. 185, 78 Am. St. Rep. 486, 55 N.E. 894 (see § 52, note(k), post).

On the ground that the "work contracted for was lawful and necessary for the improvement and use of the defendant's property," the negligence of a contractor or his employé in blasting out a ledge of rock which extended close up to the wall of a building on adjoining property was held not to be chargeable to his employer, who engaged him to excavate the lot preparatory to building thereon. *Berg v. Parsons* (1898) 156 N.Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N.E. 957, Reversing (1895) 90 Hun. 267, 35 N.Y. Supp. 780. Gray, J. (with whom agreed Bartlett and Haight, JJ.), dissented on the ground that there was evidence justifying the conclusion that the employer was culpable in engaging an incompetent contractor.

Where a team, which was standing in a street crossing the one in which the sewer was being constructed, was frightened by the noise of a blast fired by the contractors in the prosecution of the work of constructing a sewer, and the plaintiff, while attempting to control them, was injured it was held that the defendant municipality was not liable. *Herrington v. Lansingburgh* (1888) 110 N.Y. 145, 6 Am. St. Rep. 348, 17 N.E. 728. The court said: "If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blasts and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could, in some degree, smother the blasts so as to prevent falling rocks and much of the noise of the explosion: or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village."

Recovery was denied in a case where the plaintiff was injured by a rock thrown out by a blast set off while the foundation for a house was being excavated by a contractor. *Hunt v. Vanderbilt* (1894) 115 N.C. 559, 20 S.E. 168.

A city is not liable for a death caused by a stone which was thrown up by a blast set off during the progress of the operations incident to the excavation of a water-works trench by a contractor. *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

A city which, as licensor, permits the board of public commissioners to construct a sewer from the courthouse to a sewer of the city, is not liable for damage sustained by the negligent and careless manner in which the contractor blasted rock. *Schnurr v. Huntington County* (1899) 22 Ind. App. 188, 53 N.E. 425.

A passer-by who is struck by a stone thrown up by a blast set off by a contractor engaged in constructing a sewer for a city cannot recover damages from the city. *Blumb v. Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, holding that the case relating to the duty of a city to keep its streets in a safe condition for public travel, were not applicable as precedents.

For other cases in which the plaintiff was held not to be entitled to recover for injuries due to blasting, see *Tibbetts v. Knox & L. R. Co.* (1873)

41. Negligence productive of dangerous conditions of a more or less permanent character.—The cases cited below illustrate the circumstances under which the courts decline to hold employes responsible for injuries resulting from conditions which create a continuous and more or less permanent situation which may at any moment eventuate in disaster (a).

62 Me. 437; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The Supreme Court of New York has held that a preliminary injunction will not issue at the instance of a tenant, to restrain his landlord from blasting in an adjoining piece of land, where it appears that he personally has not been concerned in the blasting, but has employed an independent contractor to accomplish a certain result, not in itself wrongful, reserving to himself no control over the manner in which it shall be done. *Hill v. Schneider* (1897) 13 App. Div. 299, 43 N.Y. Supp. 1. The decision was put upon the ground that it did not appear that the defendant was proceeding to do something which might injure the petitioner pendent/lite.

It has been held that art. 16, § 8, of the Pennsylvania Constitution of 1874, is merely intended to impose upon corporations having the power of property and cannot be so construed as to render a railway corporation which is entitled to exercise that power responsible for damages caused by the negligence of a contractor in blasting rocks so as to throw them on property adjacent to the right of way. *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

(a) (1) *Work on Railways.*—Recovery has been denied under the following circumstances:

Where a labourer was injured by the derailment of a construction train, resulting from defects in the track and in the rolling stock. *St. Louis, Ft. S. & W. R. Co. v. Willis* (1888) 38 Kan. 330, 16 Pac. 728 (case turned largely on the question whether the particular section of the road on which the accident occurred had been turned over to the company, so as to bring the construction train under its control).

Where a bridge gave way under a train, while it was being constructed, and killed a servant of the contractor for its construction. *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S.E. 163.

Where the servant of contractors for the construction of a railway was injured through breathing the exhalations from a poisonous mixture which they had applied to some timber to prevent its decaying. *West v. St. Louis, Y. & T. H. R. Co.* (1872) 63 Ill. 545.

Where, owing to the negligence of a contractor in constructing defective stock-gaps, and throwing down fences, cattle strayed on to land adjacent to the track. *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401.

Where a conductor of a street car was thrown against a pile of stones negligently left near the track by a contractor engaged to repair the pavement between the rails. *North Chicago Street R. Co. v. Dudgeon* (1896) 69 Ill. App. 57.

Where a horse sank through the earth between the pavement and a bridge laid over an excavation made in a street on which a railway was being constructed. *Hauser v. Metropolitan Street R. Co.* (1899) 27 Misc. 538, 58 N.Y. Supp. 286.

Where a horse struck his foot against some rails which had deposited on a street, preparatory to their being used. *Fulton County Street R. Co. v. McConnell* (1891) 87 Ga. 756, 13 S.E. 828.

Where a horse was frightened by the flapping of canvas suspended under a trestle as a protection against the dropping of paint on the street, the accident being due to the negligence of the servants of a contractor employed to

paint the trestle, in hanging the canvas so that it became loose. *McCann v. Kings County Elev. R. Co.* (1892) 46 N.Y.S.R. 327, 19 N.Y. Supp. 668.

Where workmen employed by a bricklayer contravened the orders of a railway company's engineer by excavating a road in such a manner as to cut into a drain, the result being that the water escaped on to the premises of an adjoining landowner. *Steel v. South Eastern R. Co.* (1855) 16 C.B. 550.

Where a young child was drowned in a pool of water formed by a heavy storm on the defendant's right of way, in a corner between one of its own embankments and one belonging to an intersecting line, the premises being still in possession of an independent contractor under an uncompleted contract. *Charlebois v. Gogebio & M. River R. Co.* (1892) 91 Mich. 59, 51 N.W. 812.

Where a contractor deposited wasted earth on land outside the right of way. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Where a contractor's workmen left down certain bars leading into plaintiff's field. *Clark v. Vermont & C. R. Co.* (1854) 28 Vt. 103.

Where a wire stretched on a street during the construction of a railway caused injury to a person passing along the street. *Sanford v. Pawtucket Street R. Co.* (1896) 19 R.I. 537, 33 L.R.A. 564, 35 Atl. 67.

In a very elaborately argued case the declaration alleged that the defendant had made a deep cut while its road was in process of construction, and had deposited the earth taken therefrom in such a manner as to dam up a small stream and form a pond near the plaintiff's house; that the defendant had also stationed near the house a camp of convicts whom it was using in the construction of the road, and permitted the filth accumulating in the sinks of the camp to flow therefrom and be deposited near the house; by reason of which the house became infected with noxious scents, malaria, and other substances injurious to health. The defence was that if the acts so alleged were done at all, they were done by an independent contractor. The argument of plaintiff's counsel was that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained and from which the water is carried off must be filled up, and unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. The court thus disposed of this argument: "If the premises of counsel are true, the conclusion might also be true; but if a railroad is built properly, we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and when it contracted with the construction company, it was of course implied that the latter would do the work in a proper and lawful manner. 'A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done.' 1 Redf. Railways, 6th ed. 542. Moreover, the evidence shows that, in the very place where this nuisance is said to have occurred, the railroad company had provided means which, if used, would have prevented the nuisance. The superintendent directed that a waste-way should be placed there, but the contractor put in a pipe which the defendant claims was one of the causes of the nuisance, (1) by being too small to carry off the water in proper time, and (2) because it was not put upon the bed of the stream, but several inches above the bed, thereby causing the water to pond near the plaintiff's house. Nor would the other things which it is claimed caused the nuisance, to wit, the throwing up of the fresh dirt, the convict camp and the hog and horse lot, render the railroad company liable. It had lawful authority for excavating the hills and filling the bottoms in order to make its road-bed. And the placing of the convict camp and the hog and horse lot near the plaintiff's house was the act of the construction company, over which, it appears from the record, the railroad company had no power or control. So it will be seen that the work committed to the construction company was not wrongful per se, nor did it necessarily result in a

nuisance, and therefore does not fall within the first exception to the general rule." *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S.E. 277.

A street railway company is not liable for injuries received by a child which was drawn into a machine used for the manufacture of concrete by one who had contracted for the building of the road. *Chicago City R. Co. v. Hennessy* (1884) 16 Ill. App. 153. The court said: "The accident arose from the prosecution of work by the contractor purely collateral to the construction of the road. The company contracted with Holmes to build a designated cable system, with certain specified materials to be furnished by him, among which were engines, wire, concrete, etc. How or where the contractor should procure such materials, was a matter with which the company had no concern. The contract did not provide how or where the concrete should be procured or mixed, much less that it should be mixed in a machine like the one which caused the injury; nor was Holmes the agent of the company in procuring and using the machine. The making of the concrete upon the street and the use of the machine, was the idea and device of Holmes for his own convenience and benefit. The company could not interfere or control as to where he should procure or manufacture his materials, and he might manufacture them in the public street if the municipal authorities did not object. The use of the machine was not one of the natural contingencies which the company were required to anticipate, nor which it could have provided against. Its use was only subsidiary to the performance, by the contractor, of his undertaking."

A railway company is not liable for injuries resulting from the fact that a derrick furnished to a contractor for the purpose of unloading railway iron was permitted by him to get into a defective and dangerous condition. *King v. New York C. & H. R. R. Co.* (1876) 66 N.Y. 181, 23 Am. Rep. 37.

A railway company is not liable for the negligence of a servant of a contractor for the construction of a portion of its road in leaving on a highway one of a number of large stones which were to be used for the abutments of a bridge. *Pawlet v. Rutland & W. R. Co.* (1855) 28 Vt. 298.

In a case where a member of a train crew on a line built by a lumber company for its own use was injured as a result of certain logs slipping off of a car, and there was evidence tending to show that the loading was done by a contractor, it was held error to refuse to submit to the jury the question whether the accident was wholly caused by negligent loading. *Haley v. Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N.W. 321, 956.

The assumption in all the cases above cited is that the acts of negligence were not done in the exercise of the charter powers of the company. See § 62, post.

(2) *Construction of Bridges.*—A municipality is not liable for injuries caused by the collapse of a bridge, while it is under construction. *Wood v. Watertown* (1890) 58 Hun. 298, 11 N.Y. Supp. 864.

(2) *Construction of Embankment and Dams.*—The employer is not liable, where a contractor for the work of diverting a creek erected on an embankment so defectively that it could not resist the action of the water which it was intended to confine. *Allen v. Hayward* (1845) 7 Q.B. 960, 4 Eng. Ry. & C. Cas. 104, 15 L.J.Q.B.N.S. 99, 10 Jur. 92.

On the ground that the work of dredging out a canal for a city was done by an independent contractor, the city was held not to be liable to one for the flooding of his fields thereby from the building of a dam without construction of a by-pass to carry off water, though the city had an inspector of the work, who located the dam. *White v. Philadelphia* (1902) 201 Pa. 512, 51 Atl. 332.

A person who has employed a competent architect to erect a dam is not responsible for injuries caused by its bursting while the work is in progress. *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345.

(3) *Construction of Telegraph and Telephone Lines.*—The principal employer is not liable where a child's hand is caught in a pulley used by a contractor for stringing telephone wires. *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N.W. 957.

No recovery can be had, where the plaintiff was injured by falling into a hole dug in a public street by a railroad company engaged, as an independent contractor, in erecting a line of poles and wire for the defendant company. *Hackett v. Western U. Teleg. Co.* (1891) 80 Wis. 187, 49 N.W. 822.

(4) *Laying of Pipe Lines.*—A gas company is not liable for injuries due to an explosion of gas consequent upon the negligence of a contractor's servant, who in the course of the work of laying its pipes undermined a pipe belonging to another company, and thus caused it to break. *Chartiers Valley Gas Co. v. Lynch* (1887) 118 Pa. 362, 12 Atl. 435; *Chartiers Valley Gas Co. v. Waters* (1888) 123 Pa. 220, 16 Atl. 423. Commenting on a charge of the trial judge which seemed to imply that because the pipe of the other company was necessarily undermined, and this result was therefore contemplated by the contract, the employer was liable, for the reason that there was a necessary interference with the rights of others, the court pointed out that there was no necessary interference with the rights of others unless negligence existed. Both companies had their rights, and they were perfectly consistent with each other. In some jurisdictions it may be that this case would have been referred to the doctrine discussed in Subtitle V., post.

(5) *Construction of Buildings.*—Persons contracting for the erection of buildings have been held not responsible under the following circumstances:

Where an excavation for a party-wall was so carelessly made that it collapsed. *Lawrence v. Shipman* (1873) 39 Conn. 586.

Where the excavation for a house is so negligently made as to injure a building on the adjacent premises. *Aston v. Nolan* (1883) 63 Cal. 269; *Crenshaw v. Ullman* (1893) 113 Mo. 633, 20 S.W. 1077; *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S.E. 320. (See, however, § 52, as to this class of cases).

Where a floor fell in consequence of its being overloaded. *Dillon v. Sixth Ave. R. Co.* (1882) 16 Jones & S. 283, Affirmed in (1884) 97 N.Y. 627.

Where the servant of a contractor was injured by reason of the weakness of the floor of a building which was under construction. *Humpton v. Unterkircher* (1896) 97 Iowa 509, 66 N.W. 776.

Where a wall fell on the servant of a person who had taken a sub-contract for excavation work. *Hale v. Johnson* (1875) 80 Ill. 185.

Where a roof fell while it was being constructed. *Hearn v. Quillen* (1901) 94 Md. 39, 50 Atl. 402.

Where a wall fell on a workman while it was being erected. *Gallagher v. Southwestern Exposition Asso.* (1876) 28 La. Ann. 943; *Treadwell v. New York* (1861) 1 Laly 128.

Where a building fell, owing to the defective manner in which it had been constructed. *Braidwood v. Bonnington Sugar Ref. Co.* (1866) 2 Sc. L.R. 152.

Where the iron columns and entablatures in a new building fell, owing to their not being sufficiently propped. *Peyton v. Richards* (1856) 11 La. Ann. 62.

Where plaintiff's property was injured by the fall of a derrick used in the construction of a building. *Prairie State, etc., Co. v. Doig* (1873) 70 Ill. 52.

Where a wall was so defectively built that it was blown down, before it was completed. *Benedict v. Martin* (1862) 36 Barb. 288.

A landlord was held not to be liable in an action for damages brought by the parents of a child who fell into a privy vault which a contractor had dug on demised property and left uninclosed for several months. *Wiese v. Remme* (1897) 140 Mo. 289, 41 S.W. 797.

Where the cap blows out of the end of a steam supply pipe which is being put in by one contractor and injures the servant of another contractor, the owner of the building is not liable, if the accident is due to poor material, defective workmanship, or bad management. *Jones v. Philadelphia Traction Co.* (1898) 185 Pa. 75, 39 Atl. 889.

A servant of the owner of a building under construction cannot maintain an action, where he received an injury by reason of the negligence of the employes of contractors for the masonry of a building in overloading one of the upper floors with brick and stone. *McEnanny v. Kyle* (1887) 14 Daly 268.

Nor where he was injured by falling down an elevator well left open and unguarded by the contractor's servants. *Conway v. Furst* (1895) 57 N.J.L. 645, 32 Atl. 380.

Nor where he was injured by the fall of a heavy post, the accident being due to the negligent construction of the building. *Mickee v. Walter A. Wood Mowing & Reaping Mach. Co.* (1894) 77 Hun. 559, 28 N.Y. Supp. 918, first appeal (1893) 70 Hun. 456, 24 N.Y. Supp. 501.

A man in the employ of one who has taken a contract for the mason work on a building cannot recover damages from the principal employer for injuries caused by defects in a scaffold which had been erected for the use of one of the carpenters, where it is shown that the employer refused to provide a scaffold, and the contractor was told that the scaffold already set up was not to be used unless it was strengthened. *Larock v. Ogdensburg & L. C. R. Co.* (1882) 26 Hun. 382.

(6) *Repairing or Reconstruction of Buildings.*—The rule applicable to buildings which are being reconstructed or repaired is in no way different from that which prevails with respect to buildings under construction. Hence, while the owner of a building contracts with a builder to re-arrange a building according to certain plans, and, while he was in possession, plaintiff, in the employ of a company doing some electric work in the building, falls through a hole in the floor which is concealed by rubbish, the owner is responsible for the resulting injury. *Hogan v. Arbuckle* (1902) 73 App. Div. 591, 77 N.Y. Supp. 22, following *Murphy v. Altman* (1898) 28 App. Div. 472, 51 N.Y. Supp. 106.

Nor is he liable where his house, while it is being raised up for an addition beneath, falls upon the house of the adjoining owner. *Connors v. Hennessey* (1873) 112 Mass. 96.

Nor where an employé of an independent contractor engaged in tearing down a building was injured by the sudden collapse of the building owing to the contractor's having over-weighted one of the floors with brick. *Cullom v. McKelvey* (1898) 26 App. Div. 46, 49 N.Y. Supp. 669.

Nor where one of the employer's tenants, while passing through the hall, struck his foot against a piece of plank which had been laid down to protect some tiling just put in by the contractor. *Mahon v. Burns* (1894) 9 Misc. 223, 29 N.Y. Supp. 682, Affirmed in (1895) 13 Misc. 19, 34 N.Y. Supp. 91.

Nor where the injury was caused by the negligence of the servant of a contractor for the re-construction of a staircase in nailing cleats on to the steps in such a manner as to cause the plaintiff to fall. *Louthan v. Heroes* (1902) 138 Cal. 116, 70 Pac. 1065.

Nor where the injury was caused by the negligence of the servants of a plumber, who while engaged in repairing waterpipes negligently left open a trap door. *Bennett v. Truebody* (1885) 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329; *Burns v. McDonald* (1894) 57 Mo. App. 599.

Nor where the injury resulted from leaving an opening in a temporary plank sidewalk laid down while excavations were being made underneath. *Frassi v. McDonald* (1898) 122 Cal. 402, 59 Pac. 139, 712.

Nor where the workmen of a person employed to repair the wall of a house dug up the ground, and left it so piled that, when a storm occurred, water was turned into the cellar of the adjoining house. *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N.E. 405.

Nor where a ladder was so placed by workmen engaged in repairing a roof, that it was blown down by the wind. *McCarthy v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

Nor where a gas-fitter by neglecting to turn off the gas caused an explosion. *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, 6 Jur. 606, Car. & M. 64, 11 L.J. Exch. N.S. 271.

Nor where a drainpipe burst owing to the negligence of the contractor's servants and damaged a tenant's goods. *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N.E. 272, Reversing (1895) 60 Ill. App. 587.

Nor where a cistern in a house was caused to overflow through the negligence of a plumber. *Blake v. Woolf* [1898] 2 Q.B. 426, 67 L.J.Q.B.N.S. 813.

Where the owner of a building which has been damaged by fire turns it over to an independent contractor to be repaired, he is not liable for injuries received by the servant of a sub-contractor who, in groping about to find a door leading to a staircase opens by mistake a door leading to an elevator shaft, and fell down it. Under such circumstances the injured person does not enter the building under an implied invitation from the owner, and the latter cannot be held liable on the ground of the confusing arrangement of the interior. *Butler v. Lewman* (1902) 115 Ga. 752, 42 S.E. 98 (construing Ga. Civil Code, §§ 3818, 3818).

There was held to be no evidence of liability on the part of the defendant, the owner of a house, where the workmen of the contractor in pulling down the front wall of the house removed a breast-summer which was inserted in the party-wall between the defendant's and plaintiff's houses, without taking any precautions by shoring or otherwise, the result being that the front wall of the plaintiff's house fell. *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 31 L.J. Exch. N.S. 214, 10 Weekl. Rep. 214. Wilde, B., considered that the "the absence of a shoring is like the absence of a proper hoarding, or any of the ordinary precautions which belong to the careful taking down of a wall." This decision, however, was disapproved by Lord Blackburn in *Dalton v. Angus* (1881) L.R. 6 App. Cas. 740, 50 L.J.Q.B.N.S. 689, 44 L.T.N.S. 844, 30 Weekl. Rep. 196, and in *Hughes v. Percival* (1883) L.R. 8 App. Cas. 443, 446, 447, 52 L.J.Q.B.N.S. 719 49 L.T.N.S. 189 31 Weekl. Rep. 725, 47 J.P. 722. See § 52, post.

(7) *Demolition of Buildings*.—The owner of a building having no actual knowledge of the condition of its walls, or how the work of removing one of such walls is being done, is not liable for the death of a woman and child on an adjoining lot, caused by the fall of such wall consequent upon an independent contractor's negligence in removing the roof from the building without properly supporting the wall. *Engel v. Eureka Club* (1893) 137 N.Y. 100 33 Am. St. Rep. 692, 32 N.E. 1052, Rev'g. (1892) 45 N.Y.S.R. 940, 18 N.Y. Supp. 945, which was a reiteration of the judgment in (1891) 59 Hun. 593, 14 N.Y. Supp. 184. The court said: "It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbour by falling, and if he negligently omits its performance and his neighbour is injured, the injury is actionable. (*Mullens v. St. John* 57 N.Y. 567, 15 Am. Rep. 530.) But the evidence is undisputed that the wall was safe and would not have fallen if it had been left as it was when the contract was made, supported by the roof. It was not a menace in its existing condition. It became dangerous only in consequence of the manner in which the contractor proceeded to take it down. It would probably have been less liable to fall, although deprived of the support of the roof, if the wall had been in perfect repair when the contractor entered upon the work. But we perceive no causal connection between the neglect to repair and the injury to the plaintiff's estate. The sole cause in a legal sense was the negligence of the contractor in omitting to do what he was bound to do. The performance of his duty would have prevented the injury."

For a case which conflicts with this decision, see s. 52, subd. (10), post.

A tenant whose premises are exposed and goods injured as a result of the manner in which a man contracting with the landlord for the removal of the adjoining house cannot recover damages from the landlord. *Rotter v. Goerlitz* (1890) 16 Daly 484, 12 N.Y. Supp. 210.

(8) *Work Performed on Streets and Highways*.—The defendants were employed by A. to pave a district. They contracted with B. to pave one of the streets. B's workmen, in the course of paving the street, left some stones at night, in such a position as to constitute a public nuisance, and the plaintiff injured by falling over these stones. No personal interference of the defendants with, or sanction of the work of laying down the stones was proved. Held, that the defendants were not liable. *Overton v. Freeman* (1852), 11 C.B. 867, 16 Jur. 65, 21 L.J.C.P. N.S. 52, 3 Car. & K. 52. Maule, J., said: "I apprehend, that, if the defendant had been present and directed or sanctioned the doing of the act complained of, they would have been responsible for it."

But here they are sought to be charged simply on the ground that they had contracted with the parish authorities to do the work, in the performance of which by their sub-contractor the negligence happened which has given rise to the plaintiff's misfortune." Creswell, J., said: "The defendants not having personally interfered or given any directions as to the performance of the work, but merely having contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of it. It is quite true, as was said in *Bush v. Steinman* (1799) 1 Bosw. & P. 404, that the original contractor might be liable equally with the sub-contractor, if he in any manner directed or countenanced the doing of the act complained of. But there is no pretense for so charging the defendant here; they contracted with Warren to lay down the kerbstone in a particular way, not to so place the stones, and so negligently leave them, as to occasion injury to the plaintiff. If the act contracted to be done would itself have been a public nuisance, of course the defendants would have been responsible." Williams, J., said: "The plaintiff's counsel has rested his argument upon a broad and intelligible ground, viz., that the act complained of is a public nuisance. Some of the cases, it is true, would seem to justify that distinction; but it seems to me that we cannot give any weight to it without overruling *Knight v. Fox* (1850) 5 Exch. 721, 20 L.J. Exch. N.S. 9, 14 Jur. 963."

The defendants employed A. for a sum of money to fill in the earth over a drain constructed for them across a highway, from their house to a common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A. filled in the earth, but left it so heaped above the level of the road, that, there being neither light nor signal, the plaintiff by night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the defendant was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained. Held, that there was no evidence of their liability, inasmuch as the wrong complained of was a public nuisance by A., which the defendants, (whether A. was their servant or only a contractor), had not authorized him to commit, having merely directed generally the doing of an act which might have been done without committing a public nuisance. *Peachey v. Rowland* (1853) 13 C.B. 182, 17 Jur. 764, 22 L.J.C.P.N.S. 81. "Unless you can show," said Maule, J., "that the work was so done that the defendants might have been indicted for obstructing a public highway, they are not liable in this action. I am satisfied that the decision in *Overton v. Freeman* (1852) 11 C.B. 867, 16 Jur. 65 212, J.C.P.N.S. 52, 3 Car. L. 52, was right, though I was afterwards less satisfied with the reason which I gave. . . . The true result of the evidence here was, that the defendants had nothing whatever to do with the wrongful act complained of. They employed somebody to do something, which might be done either in a proper or improper manner; and he did it in a negligent and improper manner, and injury resulted to the plaintiff. That is the substance of the evidence. The question is, whether the evidence fairly justified a verdict for the defendants. We have no right to look with extreme scrupulosity in cases of this sort, to see if there is not some gain of evidence the other way. If the whole evidence taken together is not such as to warrant a jury in finding for the plaintiff, practically speaking there is no evidence. I am of opinion, that, if the jury had upon this evidence found that the defendants did the wrong complained of their verdict would have been set aside as not being warranted by the evidence. There was in truth no evidence for the practical purpose in hand."

A house owner is not liable for injuries received by a passer-by who, owing to the negligence of a contractor employed to repair a footpath, falls into the area underneath the footpath. *Du Pratt v. Lick* (1869) 38 Cal. 691 (intrinsic danger of work not discussed).

A house owner is not liable, where a contractor employed to put down a stone sidewalk falls into an unguarded excavation made in the course of the operation. *Schweickhardt v. St. Louis* (1876) 2 Mo. App. 571. The possibility of the plaintiff's being entitled to recover on the ground of the intrinsic danger of the work was not discussed. See § 51, post.

An abutting landlord cannot be held liable on the ground of the work's necessarily or probably involving danger for injuries caused by an obstruction left in the street by one who had contracted to lay a sidewalk for him. *Independence v. Slack* (1895) 134 Mo. 66, 34 S.W. 1904.

A city is not liable for injuries received by the servant of a contractor, as a result of the defective shoring of the sides of a trench excavated for a sewer. *Foster v. Chicago* (1902) 197 Ill. 264, 64 N.E. 322, affirming (1901) 96 Ill. App. 4.

A servant of a contractor cannot recover from the employer for injuries caused by the collapse of the sides of a ditch dug for laying a pipe-line. *Vincennes Water Supply Co. v. White* (1890), 124 Ind. 376 24 N.E. 747.

In a case where the plaintiff's intestate was struck and killed by a fragment of rock thrown up by a blast set off during the progress of the work of excavating a trench for a pipe-line, it was held to be error to charge the jury on the theory, that the construction of waterworks was a nuisance, and that it was therefore the duty of the city to impose on the contractor stipulations requiring him to take necessary precautions, or to abate the danger, if its attention was afterwards called to the dangerous conditions. *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

In a leading New York case the defendant who had received a license from the authorities to construct a public street at their own expense were held not to be liable for an injury received by one who drove at night into an open sewer which had been left unguarded and unlighted. *Blake v. Ferris* (1851) 5 N.Y. 48, 55 Am. Dec. 304. In *Storrs v. Utica* (1858) 17 N.Y. 104, 72 Am. Dec. 437, Comstock, J., distinguishes this case from those in which the liability of a municipal corporation for the defective condition of a street is in question, but takes occasion to express a doubt whether the decision was correct in view of the facts. See § 51(a) post. There would certainly seem to be good ground for contending that the position of a licensee of a municipality under such circumstances cannot be either more or less favorable than that of the municipality itself. But the decision is in line with several of those cited below.

Where W. contracted with the P. Gas Co. to dig a trench, the work to be under the supervision of the company's engineer, and W. sublet the work to D., and in consequence of D's negligence in not guarding the excavation a foot-passenger was injured, it was held that D. was alone liable. *Wray v. Evans* (1875) 80 Pa. 103, approved in *Edmundson v. Pittsburgh M. & Y.R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

So, also the principal employer was held not to be responsible where the plaintiff had fallen into an open trench which had been dug in a street by permission of the authorities, and left unprotected by the contractor. *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113. (It should be noticed that the trench in this case, having been opened under a license did not constitute a nuisance). In a later case arising out of the same accident the municipality which had granted the license was held not liable, and the general rule was laid down, that such a corporation, when it grants to one a license for a purpose proper and lawful, is not liable to one injured by reason of the misuse or abuse of that license, whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434. The court said: "It is settled that the defendant had the right to grant the license to dig the ditch complained of; in this it did nothing unlawful. How then, is it responsible for the negligent act of Florence? It certainly cannot be contended that its responsibility would be greater in a case such as this, than if Florence [the contractor] had been acting under a contract with the borough instead of Dr. Smith [the principal employer]. Yet under such a contract it would not have been liable. His employment was independent of the control and direction of the person with whom he had contracted. He was in the lawful possession of the street in which the water pipe were to be laid, and, as was said in *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642, the borough could not fill up the trench which he dug, or erect barriers which he might not tear down if they obstructed his work. . . . If, as was said in *Smith v. Simmons*, the excava-

tion had been per se a nuisance, the case would be different, for in that event the public authorities would have been bound to abate it as soon as they had knowledge of the obstruction, but not being a nuisance, but lawful, the borough cannot be held for an accident happening thereby, and Florence alone must be regarded as responsible for the injuries resulting to the plaintiff from his neglect."

Liability has been denied, where a horse was injured by stepping into a trench which was being dug in an alley to connect defendant's drain with a private sewer belonging to his neighbour. *Zimmerman v. Baur* (1894) 11 Ind. App. 607, 39 N.E. 296.

And where a fireman in employ of city was knocked off his wagon by a "coal run" built across a street for the purpose of unloading coal from a barge. *Davis v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

A municipal corporation which has employed a contractor to execute the various kinds of work mentioned in the following paragraphs is not liable under the circumstances there indicated.

Where the grading of a street was done so carelessly as to cause the surface water and sewage to back up and accumulate on the plaintiff's premises. *White v. New York* (1897) 15 App. Div. 440, 44 N.Y. Supp. 454.

Where a pile-driver hammer was left in such a position as to frighten a horse which was being driven on a highway under repair, the consequence being that the driver was injured. *Howarth v. McGugan* (1893) 23 Ont. Rep. 396.

Where a foot-passenger stepped into a hole left open near the curbing while sewer was being constructed. *Charlock v. Freel* (1891) 125 N.Y. 357, 26 N.E. 262, affirming (1888) 50 Hun. 395, 3 N.Y. Supp. 226.

A Highway Board instructed its surveyor to employ one S., a contractor, to repair a road. In the course of the work, with which the board did not interfere, the servants of S. left stones on the highway at night, without placing a light to shew where they were, and a traveller drove his gig against the obstruction and was injured. *Reid v. Darlington Highway Board* (Q.B.D. 1877) 41 581. In the very brief judgment delivered for the court by Lush, J., it was held that there was no evidence of negligence on the part of the board or its surveyors. The precise rationale of this decision is not clear from the report, which merely mentions that plaintiff's counsel argued that the contractor's men were servants of the Board—a contention manifestly untenable. Neither the court nor the counsel averted to the possibility of maintaining an action on the ground that the duty of the Board to keep the highway safe for travel was primary and non-delegable. (See §§ 58, 59, post.)

In a Newfoundland case, where the court's conclusion was that there was no statutable obligation on the part of the Board of Works to keep a certain road in repair, the Board was held not liable for any injury to a person who drove against a heap of gravel which had been left in the road through the negligence of one who had contracted for its repair. *Duchemine v. Board of Works* (1880) Newfoundland Rep. (1874)-1884) 236. This decision is in conflict with the American cases cited in s. 51, post.

In Pennsylvania a municipality has been held not to be liable for an injury received by a person who fell into an open and unguarded sewer. *Painter v. Pittsburgh* (1863) 46 Pa. 213; *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; nor where the injury was received by a person who turned aside to avoid a pile of earth on a pavement, and fell into a trench dug for the purpose of laying a curbstone. *Eby v. Lebanon County* (1895) 166 Pa. 632, 31 Atl. 332. See also *Susquehanna Depot v. Simmons* (1886) 112 Pa. 384, 56 Am. Rep. 317, 5 Atl. 434, as stated supra. These decisions are in conflict both with those reviewed in § 51, and with those reviewed in §§ 58-60, post, and contrary to the weight of authority.

(9) *Work Done on Premises Adjacent to Streets and Highways, and Affecting the Safety Thereof.*—Where a proprietor of a house contracted with a builder to execute certain repairs, and the builder made a sub-contract for the plaster work, it was held that neither the proprietor nor the principal contractor was liable for injuries caused by the upsetting of a vehicle which resulted from the negligence of the sub-contractor in leaving a heap of lime in the street,

without any fence or protection, outside the space which had been duly set apart, fenced in, and lighted by the principal contractor, in accordance with the provisions of a Police Act. *McLean v. Russell* (1850) 12 Sc. Sess. Cas. 2nd Series, 887, 22 Sc. Jur. 394. Lord Fullerton said: "Here there was nothing hazardous; and if a party employed to perform the very safe operation of plastering a house, executed it in a dangerous manner, he only is blameable." Noticing the contention that there was a constructive culpa in employing careless persons, Lord Mackenzie said: "It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house, or in these persons contracting with another to do part of the work."

Abutting land owners have also been held not to be liable under the following circumstances:

Where a firm of masons employed to do the brick-work on a building created an obstruction in the adjacent street, while the work is in progress. *Richmond v. Sitterding* (1903) 9 Va. Law Reg. 41, 43 S.E. 562.

Where the plaintiff was injured by driving into a pile of planks left unlighted on a road leading to a bridge over a canal. *Weber v. Buffalo R. Co.* (1897) 20 App. Div. 292, 47 N.Y. Supp. 7.

Where a wagon was overturned by a bank of earth left on a road during the progress of excavation work. *Lancaster Ave. Impro. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

Where a person using a street was injured by an unguarded and unlighted heap of material deposited in a street by a sub-contractor for the construction of a building. *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N.W. 741 (principal contractor was defendant).

Where lumber purchased by a city was negligently piled in the street by the vendors. *Evansville v. Senenn* (1898) 151 Ind. 42, 41 L.R.A. 728, 734, 68 Am. St. Rep. 218, 47 N.E. 634, 51 N.E. 88.

Where a person employed to haul logs left some of them on a highway, thereby creating a dangerous obstruction. *Manchester v. Warren* (1893) 67 N.H. 482, 32 Atl. 763.

It has also been held that no action was maintainable under the following circumstances:

Where a piece of timber fell on a passer-by, while it was being hoisted by a derrick extending over the footway. *Vanderpool v. Husson* (1858) 28 Barb. 196 (such a derrick declared not to be a nuisance).

Where a derrick used for setting a marble front on a building fell on a passer-by. *Potter v. Seymour* (1859) 4 Bosw. 140.

Where the iron front of a building fell upon and killed a slave. *Peyton v. Richards* (1856) 11 La. Ann. 62.

Where the cornice and a portion of the front wall of a building in course of erection fell on a passer-by. *Deford v. State* (1868) 30 Md. 179.

Where a fence built around an excavation in the sidewalk was blown down and struck a passer-by. *Martin v. Tribune Asso.* (1883) 30 Hun. 391. The court said: "The structure being lawful, all the acts necessary to be done in completing it were collateral to the undertaking. If the fence was insufficient, or if the contractor went beyond the permit in obstructing the street, these acts are to be chargeable to the persons who did them."

Where a piece of scaffolding used by a mechanic in making repairs on a building was blown down by the wind and injured a passer-by. *Hexamer v. Webb* (1886) 101 N.Y. 377, 54 Am. Rep. 703, 4 N.E. 755.

Where the injury was caused by falling upon a ridge of ice formed upon the defendant's sidewalk by the negligence of the employes of a contractor engaged in pumping water from his cellar. *Larow v. Clute* (1891) 60 Hun. 580, 14 N.Y. Supp. 616.

Where a person walking into a coal hole left open in the pavement. *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

Where an excavation in the footway in front of a landowner's premises was not properly guarded. *Fuller v. Citizen's Nat. Bank* (1882) 15 Fed. 875; *Ryan v. Curran* (1878) 64 Ind. 345, 31 Am. Rep. 123 (see § 51 (a) post) (answer

alleging that the defendant's lot and appurtenances were, at the time of the injury, in the exclusive possession of the contractor, held to be sufficient) ; *Allen v. Willard* (1868) 57 Pa. 374.

Where a person fell into the opening made by removing, under a license from the civil authorities, a grating over an area. *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334. The decision last cited was disapproved by the Supreme Court of the United States in *Chicago v. Robbins* (1862) 2 Black, 418, 17 L. ed. 297 (1866) 4 Wall. 657, 18 L. ed. 427. But in another case involving very similar circumstances the Illinois court arrived at the same conclusion and stated its position as follows: "While the contractor is in possession of that part of the premises upon which the excavation is to be made with the exclusive control of the work, it becomes an incident to his undertaking to so do the work as to be reasonably safe for passers-by, observing due care for themselves, and that duty, it is declared, includes the erection and maintenance of suitable safe-guards about all excavations, at all dangerous. Under circumstances where it becomes obligatory upon the contractor to provide safe-guards around such excavations, the owner of the premises is not responsible for his failure or neglect of duty in that regard. Nor does it change the rule, the owner may have some work to perform about the building, where it is wholly disconnected with that which causes the injury." *Kipperley v. Ramsden* (1876) 83 Ill. 354.

Where the owner of premises, having occasion to construct an improvement in his cellar, which is required by the Board of Health, employs a contractor who is bound to do all work and furnish all materials, the employer is not liable for injuries to a pedestrian from colliding with a barrel placed over an open coal hole in the sidewalk, and kept there by the contractor to supply necessary ventilation for the prosecution of the work. *Maltbie v. Bolting* (N.Y. Super. Ct. 1893) 6 Misc. 339, 26 N.Y. Supp. 903.

The foregoing cases which relates to dangerous conditions in footpaths are more or less in conflict with those cited in § 51, post, and would doubtless have been differently decided in some jurisdictions.

Unless the obligation to place a boarding in front of a building under erection is imposed by a statute applicable to the locality in which the work is being executed, the owner of the building is not liable for injuries resulting from the fact that the contractor by whom it was being erected omitted to put up the boarding. *Crawford v. Peel* (1887) Ir. L.R. 20 C.L. 332. In this case Murphy, J., was of opinion that, even if a breach of a statutory obligation had been proved, the owner's liability did not extend beyond the penalty imposed. The effect of applying the doctrine thus invoked would of course have been to render immaterial the question whether the work was being done by an independent contractor or not. But the view taken by the learned judge seems to be in conflict with the rule established by the cases cited in §§ 799, 800, of the present writer's treatise on Master and Servant.

A contractor for the erection of a building is not liable for the penalty imposed by a city ordinance which forbids any person to place, leave, or deposit in the street any material, except such as is permitted by ordinance or resolution, if it appears that the ordinance was infringed by his sub-contractor, and there was no necessity for putting the material in the street. *Buffalo v. Clement* (1892) 19 N.Y. Supp. 846.

(10) *Scavenging Work*.—The defendant city had made a contract with a party for the removal of the carcasses of any animal which might die or be killed within the city limits. On one occasion after a large number of mules had been destroyed by a fire, the mayor, in order to obviate the nuisance which would have resulted from conveying the carcasses through the streets to the reduction works of the contractor, arranged with the contractor's servant to have them thrown into the Missouri River. The servant took a road to the river bank where it happened to be convenient of access, and threw the carcasses into the river at a place where it had temporarily overflowed and concealed a quarry belonging to the plaintiff. The current did not catch them, and they sank into the quarry, the result being that the plaintiff could not reopen it. For the injury so caused the city was held not to be liable. *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

(11) *Work in Harbours.*—In an action against Commissioners appointed by a local Act (5 & 6 Vict. chap. 111) Commissioners were appointed for improving a harbour, and with the sanction of the Ballast Board, empowered to exhibit lights or sea-marks for the guidance of ships navigating that harbour, it was held that the contractor employed to execute the work was guilty of negligence in not obtaining, through the Commissioner, the sanction of the Ballast Board to set up lights on the end of piles driven during the progress of the operations, and that the Commissioners were not liable for damage sustained by a vessel owing to the want of such lights. *Gilbert v. Halpin* (Ct. of Exch. 1858), 3 Ir. Jur. N.S. 300, Pigot, C.B., dissenting. This decision was put on the broad ground that it was the duty of the contractor either to apprise the employé that the work had reached the stage at which it was necessary to have lights to prevent accidents, or to put the lights out himself. The inference drawn was that, as the contractor had not performed this duty, he was the only culpable party against whom the injured person could proceed. This case was decided before the evolution of the doctrine discussed in *subtle V.*, and at the present day the conclusion of the court with regard to the same facts would possibly be different.

(12) *Excavation Work.*—A landlord is not liable, where a sub-contractor so carelessly executed a contract for the removal of certain earth and rock from the defendant's vacant lot, that a stable belonging to an adjacent landlord was injured. *King v. Livermore* (1876) 9 Hum. 298, affirmed in (1877) 71 N.Y. 605.

A person employing a contractor to haul sand from one designated spot to another is not liable for his negligence in so digging the sand as to form a dangerous bank which caved in and injured a young child. *Flink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

(13) *Work involving the use of fire for the destruction of timber.*—A landowner is not liable where a person employed to clear land set fire to some of the brushwood, and the fire spread to the premises of an adjoining landlord. *Ferguson v. Hubbell* (1884) 97 N.Y. 507, 49 Am. Rep. 544.

In several cases it has been held that a railway company is not liable for injuries caused by fire which spreads to adjoining land from the timber or brushwood which a contractor is burning on its right of way. *Woodhill v. Great Western R. Co.* (1855) 4 U.C.C.P. 449; *Rogers v. Florence R. Co.* (1889) 31 S.C. 378, 9 S.E. 1059; *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa 562.

In one case it was laid down that a railway company cannot, under such circumstances, be held liable, as a matter of law, and that the propriety of imputing such liability depends upon whether, under the given circumstances, the burning of brush would be obviously dangerous to such landowners, or whether the circumstances were such that the operation created no danger except in so far as it might arise from the careless manner in which the work should be done. *St. Louis I. M. & S. R. Co. v. Yonley* (1890) 53 Ark. 503, 9 L.R.A. 604, 13 S.W. 333, 14 S.W. 800.

No action is maintainable against a railway company, where a sub-contractor cuts a road through the plaintiff's premises, outside the right of way, and sets fires which, through their negligence, spread and burn the plaintiff's timber. *Eaton v. European & N.A.R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

A municipality is not liable where fire spreads from timber which was being burnt on a road by a contractor. *Carroll v. Plympton* (1860) 9 U.C. C.P. 345.

A town which enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of said contractor when burning the brush. *Shute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N.W. 1050.

For cases in which the defendant was held liable under similar circumstances, for the reason that the work was intrinsically dangerous, see § 52, post.

From an examination of Sub-title V., post, it is abundantly evident that, in many instances, the decisions there cited cannot be reconciled upon the facts with those which are reviewed in this

(14) *Work in mines.*—The owner or lessee of a mine who has made a contract for its operation by another person upon such a footing that the latter is put in full control of the work, and charged with the duty of seeing that the appliances which are used are kept in safe condition, is not liable to a servant of the contractor who is injured by the breaking of the rope by which the cage was lowered and hoisted. *Shaw v. West Calder Oil Co.* (1872) 9 Sc. L.R. 254; *Londeberg v. Brotherton Iron Min. Co.* (1889) 75 Mich. 84, 42 N.W. 675.

Liability has also been denied under the following circumstances:

Where the roof of a drift, being left unsupported, fell on a labourer in the employ of a person operating the mine under contract. *Smith v. Belshaw* (1891) 89 Cal. 427, 26 Pac. 834; *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 13 N.W. 499.

Where the mouth of a pass leading from one of the levels in a mine to a lower level was left uncovered and unlighted owing to the negligence of a person operating the mine under a contract. *Martin v. Sunlight Gold Min. Co.* (1896) 17 New So. Wales L.R. 364.

Where the servant of a contractor engaged in sinking an air-shaft is injured by an explosion of gas. *Welsh v. Lehigh & W. Coal Co.* (1886 Pa.) 5 Atl. 48; *Welsh v. Parrish* (1892) 148 Pa. 599, 24 Atl. 86.

(15) *Handling of timber.*—Liability has been denied in a case where a pile of lumber was so negligently erected by a contractor that it toppled over and fell into an adjoining lot, thereby causing the death of a man. *Andrews v. Boedeker* (1885) 17 Ill. App. 213.

The employer of a man who has contracted to deliver logs at a designated point on a river or elsewhere is not liable, where they are so negligently driven that they lodge and form a jam against a bridge, the result being that it was carried away. *Pierrepoint v. Loveless* (1878) 72 N.Y. 211; *Road Disp. No. 4 v. Pelton* (1901) 129 Mich. 31, 87 N.W. 1029; nor where owing to an unreasonable use of the employer's dam, the lands of the third person are overflowed. *Carter v. Berlin Mills Co.* (1876) 58 N.H. 52 42 Am. Rep. 572; nor where the logs are jammed so as to create an obstruction in a navigable river.. *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209 (nuisance held not to be a necessary consequence of the work contracted for); nor where a boom of logs which is to be towed across an inlet of the sea is insecurely fastened, and being set adrift by a storm is driven against the piles supporting a house. *Easter v. Hall* (1895) 12 Wash. 160, 40 Pac. 728.

(16) *Operating of ferries.*—A municipality is not liable, where the lessee of its ferry neglects to see that the wire rope by which it is operated is kept in safe condition. *Duncan v. Magistrate of Aberdeen* (Ct. of Sess. 1877) 14 Sc. L.R. 603.

(17) *Loading or unloading of ships.*—The lessee of a dock is not liable for injuries caused by the fall of a shoot which has been negligently set by a stevedore's sub-contractor. *Woodward v. Peto* (1862) 3 Fost. & F. 389.

A shipowner is not liable for the injuries received by a servant of a stevedore through the negligence of his fellow servants in failing to replace a grating over a hatchway. *Dwyer v. National S. S. Co.* (1880) 17 Blatchf. 472, 4 Fed. 493; or in exposing a trimming hatch by the removal of dunnage. *The F. Babcock* (1887) 31 Fed. 418.

In the absence of notice, actual or constructive of the defect, a shipowner is not liable for injuries received by the servant of a stevedore, as the result of the fact that an iron wheel belonging to the hoisting apparatus had become weakened, owing to wear and tear, and the want of oiling. *Riley v. State Line S. S. Co.* (1877) 29 La. Ann. 791, 29 Am. Rep. 349.

section. This remark is more especially applicable to the cases in which the injury was caused by an unguarded excavation or an obstruction on or near a highway; but the essential antagonism alluded to is also noticeable in other connections, as where the plaintiff was suing for an injury to a building caused by making an excavation near it, or for damages caused to his premises by a fire which spread after being lighted for the purpose of clearing the land of a contiguous proprietor. The inconsistency thus disclosed is, it would seem, due principally, if not entirely, to the logical difficulty which is discussed in § 49, post.

42. Acts constituting a trespass.—The effect of the cases in which the employer was held not to be liable for the reason that the acts of wilful trespass from which the injuries result were collateral to the performance of the contract is stated in the subjoined note (a).

(a) Railway company have been held not liable under the following circumstances:

Where the servants of a contractor for the construction of its road threw down the fences of an abutting landowner. *Clark v. Hannibal & St. J. O. R. Co.* (1865) 36 Mo. 203; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *St. Louis, A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *Chicago, R. I. & P. R. Co. v. Ferguson* (1893) 3 Colo. App. 414, 33 Pac. 684.

Where wasted earth which had been taken from an excavation was deposited on land outside the right of way. *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

Where a sub-contractor on a railway committed a trespass in procuring timber on land not belonging to the company. *Parker v. Waycross & F. R. Co.* (1888) 81 Ga. 387, 8 S.E. 871.

Where, without being authorized by the company, a sub-contractor on a railway hauls earth for an embankment from land which lies outside the right of way, and has been condemned. *Waltemeyer v. Wisconsin, I. & N. R. Co.* (1887) 71 Iowa 626, 33 N. W. 140 (disapproving of an instruction by which the jury were told that the defendant was responsible for whatever injury was directly committed by anyone who, while acting in his interest in building the road, took such ground as was reasonably necessary to be used for its right of way, although it had not been condemned for that purpose; *Kerr v. Atlantic & N. W. R. Co.* (1895) 25 Can. S.C. 197. In the latter case plaintiff's counsel contended that, as the company had agreed in one clause of its contract to provide the contractor with the necessary land for borrow-pits, it had made itself responsible for his acts, even though such acts should constitute trespass upon the property of others. It was held, however, that, upon a proper construction of the contract, this stipulation must be taken to refer to places, at which the contractor had borrowed by the consent of the company's engineer, and such consent being requisite under another clause of the contract. The trespass in question was, therefore, an independent tortious act for which the company could not upon any principle of the law be made responsible.

A municipality is not liable where the contractor for the grading of a street deposited earth or other materials on the land of an abutting owner. *Fuller v. Grand Rapids* (1895) 105 Mich. 529, 63 N.W. 530; *Reed v. Allegheny* (1875) 79 Pa. 300.

A similar decision has been rendered in a case where the materials deposited were taken from a sewer. *Harding v. Boston* (1895) 163 Mass. 14, 39 N.E. 441.

One who employs an independent contractor to cut standing trees on the land of a third person into lumber is not liable for damages caused to an adjoining owner by felling trees upon his fence and land. *Knowlton v. Hoit* (1891) 67 N.H. 155, 30 Alt. 346.

The owner of a lot is not liable for unauthorized acts of trespass committed by an independent contractor employed to build a house thereon. *Davison v. Shanahan* (1892) 93 Mich. 486, 53 N.W. 624 (nature of trespass not stated).

In a case where the workman of one who had contracted with the defendant, to erect a building carried away some bricks and other materials belonging to the buildings of a person who owned the adjacent land, it was held error to instruct the jury that, "if the jury should be of opinion that the workmen, whilst they were on the land by the defendant's permission, had from want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts." *Gayford v. Nicholls* (1854) 9 Exch. 702, C.L.R. 1066, 23 L.J. Exch. N.S. 205, 2 Weekl. Rep. 453.

[The Second Part of this Monograph, §§ 43-76, will deal with the circumstances under which employers are not exempt from liability for the torts of independent contractors, and will be published early in 1905.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Davies, J., Chambers.] **EX PARTE SMITHERMAN.** [June 23.

Criminal Code, s. 955 sub-s. 7. — Term of imprisonment where not otherwise directed, commencement of—County Court Judge's Criminal Court, Halifax—Jurisdiction as regards place—Not a limited one—Form of conviction—Statement in, of place where offence committed—Copy of sentence, requirements as to, under R.S. Can. c. 182, s. 42.

A motion for the discharge of a prisoner serving a term of imprisonment at Dorchester penitentiary was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as his authority.

The defects relied upon were: (1.) That the warrant did not contain any allegation of the place where the prisoner committed the offence for which he was convicted and imprisoned. (2.) That no time was stated in the warrant of commitment from which the imprisonment was to run.

Held, 1, dismissing the motion for the prisoner's discharge. Under the provisions of the Criminal Code, s. 955 sub-s. 7, the term of imprisonment in pursuance of any sentence, unless otherwise directed in the sentence, commences on and from the day of the passing of the sentence, which day the commitment shewed to have been May 6, 1904.

2. The Court of the County Court Judge, exercising criminal jurisdiction under the provisions of the Code, part 54, for the speedy trial of indictable offences, being declared to be a court of record, and the jurisdiction of the Court being made by s. 640, as regards place, co-extensive with the province, such jurisdiction was not a limited one, and the rule stated by Paley (5th ed. p. 204), with regard to inferior Courts, would not necessarily apply.

3. Even if the place where the offence was committed was absent from the body of the record of conviction, it was covered by that named in the margin, viz., the County of Halifax.

Semble, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R.S.C. c. 182, s. 42.) need not contain all the averments essential to the validity of an indictment or conviction.

Held, that the document certified by the warden in the present case as his authority was sufficient.

Longley, Atty. Gen., for the Crown. *J.J. Power*, for the prisoner.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.]

RAY v. PORT ARTHUR.

[June 6.]

Appeal—Extension of time—Failure to give security on time.

After judgment was given, declaring the plaintiff entitled to the value of certain bonds, which the defendant had failed to deliver over, such value to be determined by a reference to the local master, and after a long interval, without anything having been done under the reference, it was transferred to the Master-in-Ordinary, and after the finding of the master, and appeals and cross appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest, which was disallowed, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed, the court, under the circumstances, refused to extend the time for the allowance of the security, and the setting down of appeal.

J.R. Roaf, for the motion. J.H. Moss, contra.

From Falconbridge, C.J.K.B.]

[June 29.]

TABB v. GRAND TRUNK R.W. CO.

Railways—Negligence—Failure to fence—Contributory negligence—Infant.

A street ran to the north and to the south from the defendants' tracks in the city of Hamilton but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track, waiting for a train on another track to pass he was struck by a train running at a speed of about forty miles an hour and was killed.

Held, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced and at the same time running at such a high rate of speed; that it was for the jury to say whether upon all the facts the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with. Judgment of FALCONBRIDGE, C.J., affirmed.

Riddell, K.C., and Rose, for the appellants. D'Arcy Tate, for the respondent.

From Drainage Referee.]

[June 29.

TOWNSHIP OF CHATHAM *v.* TOWNSHIP OF DOVER.

Drainage—Cost of repairs—Varying apportionment.

Upon certain repairs to a drainage work becoming necessary one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under ss. 69 or 72 of the Drainage Act to vary the assessment.

Held, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the Act, the Drainage Referee had no power to vary an apportionment made under such circumstances. Judgment of the Drainage Referee reversed.

Wilson, K.C., for appellants. *J.S. Fraser*, for respondents.

From Teetzel, J.]

IN RE STRATHY WIRE FENCE CO.

[June 29.

Company—Winding up—Discretion—Assignment for the benefit of creditors.

When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment.

Wakefield Rattan Co. v. Hamilton Whip Co. (1893) 24 O.R. 107, and *Re Maple Leaf Dairy Co.* (1901) 2 O.L.R. 590, approved. *Re William Lamb Manufacturing Co.* (1900) 32 O.R. 243, considered.

Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of TEETZEL, J., affirmed.

Aylesworth, K.C., *O'Neil* and *C.A. Moss*, for appellants. *Watson*, K.C., for respondents.

Full Court.]

[June 30.

CORPORATION OF WATERLOO *v.* CORPORATION OF BERLIN.

Municipal corporations—Extending drain into adjoining municipality—Terms and conditions—Award of arbitrators—Municipal Act.

Appeal from the judgment of TEETZEL, J., setting aside the following award made by arbitrators under ss. 554, 555, of the Municipal Act, 3 Edw. VII. c. 19:—"That the town of Berlin may enter upon, take and use any land in the adjacent municipality of the township of Waterloo, in any way necessary . . . for . . . providing an outlet for the main outfall sewer of Berlin . . . into or through the said township of Waterloo . . . but subject always to the compensation to persons who

may suffer injury therefrom." Application had previously been made to the municipality of Waterloo to consent, but it had refused to do so. No by-law had ever been passed by the municipality of Berlin defining the lands to be taken or affected, or the route of the proposed sewer into, or through Waterloo:—

Held, Moss, C.J.O., and MACLENNAN, J.A., dissenting, that the award was bad, not only because there was in it a total lack of any terms or conditions imposed upon Berlin such as the statute contemplates; but also because there had been no proper commencement of the proceedings upon which to base an award. The whole scope and trend of the legislation is clearly based upon this, that as a first step, a by-law defining the course in the contiguous municipality of the proposed sewer, and the lands and roads to be affected, shall be passed by the municipality seeking the extension, and notice thereof given to the contiguous municipality. Waterloo should certainly have had an opportunity, before the award was made, of suggesting and having considered such reasonable terms and conditions as were necessary to protect the inhabitants of that township, but no such opportunity was given. Appeal dismissed.

Aylesworth, K.C., *C. A. Moss*, and *Clement*, K.C., for plaintiffs.
Du Vernet, for defendants.

Osler, J.A.] . *TABB v. GRAND TRUNK R.W. Co.* [July 27.
Court of appeal—Practice—Motion to extend time for allowance for security
—Jurisdiction of single judge.

A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court, in a case where no such appeal can be brought without leave; although it be impossible to move for such leave, owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave, or to allow the appeal, under the provisions of 60 Vict. c. 24 (O.), does not depend upon a single Judge making such an order.

Rose, for the motion. *D'Arcy Tate*, contra.

HIGH COURT OF JUSTICE.

MacMahon, J.] *RITCHIE v. CENTRAL ONTARIO R.W. Co.* [March 7.
Railways—Receiver—Authority to construct portion of line—Objection of
bondholders—Order for sale of road.

The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line railway, where it is questionable whether such con-

struction will be of any real benefit to the undertaking, and in the face of the opposition of those of the bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road.

Walter Barwick, K.C., and *J. H. Moss*, for the motion. *T. P. Galt*, for *Weddell*, and *Blackstock*, contra.

Falconbridge, C.J., Street, J., Britton, J.]

[May 9.

CROSSETT v. HAYCOCK.

Dower—Bar—Infant wife—Purchaser for value—Consideration—Married Woman's Real Estate Act.

A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of bona fides involved, the question of the adequacy of the consideration cannot be inquired into.

Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration, and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son; the wife, who was still under 15, joining to bar her dower:—

Held, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R.S.O. 1897 c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son.

Judgment of MEREDITH, C.J.C.P., (6 O.L.R. 259,) affirmed.

Sinclair, for plaintiff. *Mahon*, for defendant.

Street, J.]

RE FLEMING.

[May 11

Will—Construction—Gift to members of class—Substitution—Ascertainment.

The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th of February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son.

Held, that this son was not entitled to a share of the residue. *Christopherson v. Naylor*, 1 Mer. 320, followed. *In re Potter's Trust*, L.R. 8 Eq. 52, not followed.

A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share.

Kilmer, for executors. *Harcourt*, for infant claimants. *G. F. Macdonnell*, for the nephews and nieces.

Falconbridge, C.J., Street, J., Britton, J.] [May 25

HOCKLEY v. GRAND TRUNK R.W. CO.

Staying proceedings—Postponing trial—New trial—Appeal to Supreme Court of Canada—Special circumstances.

The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant.

No special circumstances being shewn, the decisions of the Master in Chambers, 7 O.L.R. 186, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed.

Riddell, K.C., for defendants. *McCullough*, for plaintiffs.

Falconbridge, C.J., Street, J., Britton, J.] [May 25.

SELLARS v. VILLAGE OF DUTTON.

Municipal corporations—Local boards of health—Action—Parties—Corporations.

Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R.S.O. 1897 c. 248, are not corporations, and cannot be used by any corporate name. BRITTON, J., dissenting. Judgment of BOYD, C., affirmed.

McLaws and *Nesbitt*, for the plaintiff. *St. Clair Leitch*, for defendants.

Divisional Court.] BURTON v. LONDON STREET RAILWAY CO. [May 25.

Contract—Place of delivery—F.O.B.—Receipt of goods—Notice of price—Estoppel.

The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to defendants 20 cars of Pittsburg slack at \$1.25 at mine, which they would ship all rail, if defendants wished, and if plaintiffs would procure the necessary cars. The defendants telegraphed, giving an order at the price named, "F.O.B. mine," adding "Route it G.T.R., London." On the same day the plaintiff wrote accepting the order, and

stating that they would ship as soon as railroad equipment could be furnished, that an all rail rate of \$2.10 to London had been quoted them, and they would ask the carriers to put the same through at once. Subsequently, and before any shipment had been made, it was arranged between plaintiffs and defendants that No. 8 Pittsburg slack could be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal showed that the mine price stood at \$1.65, but, notwithstanding, the defendants accepted the coal, and made no protest until making their first payment.

Held, that the place of delivery was to be at London at the price of \$3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from showing the contrary.

Betts, for appellants. *Dromgole*, for respondents.

Divisional Court.] HUNTER v. CORPORATION OF TORONTO. [May 25.
Municipal corporations—Local improvements—Apportionment of part of cost between the city and railway companies—Court of Revision—Appeal from to County Judge—Prohibition.

By s. 41 of the R.S.O. 1897 c. 226, and s. 75 of the R.S.O. 1897, c. 224, an appeal lies to the County Judge, not only from a decision of the Court of Revision, but also from the refusal to decide an appeal; and by s. 6 of 62 Vic. (2) c. 27, the appeal in such case may be at the instance of the Municipal Corporation or of the Assessment Commissioner or Assistant Assessment Commissioner.

After a petition had been presented to a City Council for the construction, as a local improvement, of certain bridges over the tracks of certain railways where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened procedure in which the validity of by-laws passed for the carrying out of the said work were questioned, a by-law was passed, purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the City Engineer. Thereafter the City Engineer made his report, and a reference thereof was then made to the Court of Revision, whereupon such Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it.

Held, that the County Judge could probably entertain an appeal from the Court of Revision at the instance of the city and the Assistant Assessment Commissioner; and an application for prohibition was therefore refused.

H. M. Mowat, K.C., and *C. A. Moss*, for applicants. *Fullerton*, K.C., and *Chisholm*, for City of Toronto and Assessment Commissioner.

Divisional Court.] WATEROUS v. LIVINGSTONE. [May 25.
*Mortgage—Collateral security for notes—Release of liability on notes—
Discharge of mortgage—Rights of second mortgagee—Principal and
surety.*

A mortgage made by a wife to the plaintiffs, to which the husband was a party, but without joining in the covenants, was given as collateral security for the payment of certain notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone maturing at several future dates, in substitution of the original notes which the plaintiffs agreed to cancel and deliver up.

Held, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, that this enured to the benefit of the holders of a second mortgage also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs, that the plaintiff's mortgage should be considered as still subsisting.

Brewster, K.C., for the plaintiffs, appellants. *Hellmuth*, K.C. and *Dromgole*, for the defendants, respondents.

Divisional Court.] WILKES v. HOME LIFE INSURANCE CO. [May 26.
*Divisional Court—Jurisdiction—Proof of contract—Lease—Company—
Prohibition.*

In an action for breach of contract brought in a Divisional Court, in order to give the judge jurisdiction to determine the action on the merits, the fact of the making of the contract, and its breach within the jurisdiction, must first be established.

After a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, verbally agreed with the landlord for the renewal thereof, for a year at an increased rent, and received the key. The company, however, refused to agree to the lease, and the key was handed back to the landlord, and no actual occupation of the premises was ever taken by the company.

Held, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court, and prohibition was therefore properly granted.

W. T. Henderson, for plaintiff. *R. W. Eyre*, for defendants.

Britton, J.] IN RE ATLAS LOAN CO. [May 30.
Company—Winding-up—Creditors—Shareholders contributing to reserve fund.

By s. 17, sub-s. 6, of the Loan Corporation Act, R.S.O. 1897 c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation."

By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already not apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or refrain from the undivided profit, and together with the profits and increase of such sum." An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed, and many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates.

Held, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed.

Ruling of the Master in Ordinary reversed.

Hellmuth, K.C., for depositors. *Douglas*, K.C., and *Rowell*, K.C., for debenture holders. *J. A. Robinson*, for claimants. *Holman*, K.C., for liquidator.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] WHELAN *v.* PROVINCIAL MEDICAL BOARD. [July 29.
Medical Act R.S. (1900) c. 103—Registration under—Provincial Medical Board—Power to require examination as condition of registration.

The Medical Act, R.S. (1900) c. 103, after providing for the appointment of a board to be known as the Provincial Medical Board, confers upon the Board the following among other powers, viz. (sec. 12, sub-s. b.) to "regulate the study of medicine by making rules not inconsistent with this chapter in respect to preliminary qualifications, the course of study to be followed, professional examinations, and the nature of the evidence to be produced before the Board with respect thereto."

Plaintiff who held a diploma from the University of Baltimore, applied to the Provincial Medical Board for registration entitling him to practice the profession of medicine in the province of Nova Scotia. The institution from which plaintiff held his diploma, not being one recognized by the Board, the Board declined unless plaintiff passed a prescribed examination. Plaintiff declined, and applied for a writ of mandamus to compel registration.

Held, that the words of s. 12, sub-s. b. have reference not only to students of medicine in the province of Nova Scotia, but to the course of study pursued by those who, under diplomas obtained abroad, seek registration at the hands of the Board, and that the term "professional examination" extends to the examination called for in the case of a party like the plaintiff, holding a diploma from a college not recognized by the Board.

Held, further, that plaintiff, seeking the benefit of registration, and having regard to the objects of the statute, it was not unreasonable that he should be required to submit to the conditions which the statute imposed, the most material of which was the passing of an examination, which, in a case like the present, the Board was entitled to exact.

O'Connor, for plaintiff. *Chisholm*, for defendant.

Province of Manitoba.

KING'S BENCH.

Richards, J.] GUAY v. CANADIAN NORTHERN R. W. CO. [June 1.

Railway—Negligence—Passenger alighting from train where no platform—Obligation to inform conductor of physical condition.

The plaintiff's claim was for damages for an injury received in jumping from the step of a passenger car of the defendants' railway to the ground, 36 inches below, there being no platform at the point. Accompanied by her husband and brother-in-law, she was travelling on a train going west from Winnipeg to Eustace, their destination. They were in the rear one of two passenger cars in front of which was a baggage car. When the train stopped the baggage car was opposite the short platform, but the rear passenger car was wholly behind it, and it was doubtful whether the front passenger car was not also wholly behind it. Plaintiff and her companions went to the front platform of the car, her companions jumped to the ground, which sloped slightly downwards from the track, and was slippery with snow or ice, and the conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to alight. She took his hand and jumped from the lowest step to the ground. The train began to move off either as she jumped, or just before, or just after. The plaintiff was at the time two months advanced in pregnancy, and immediately after jumping she felt great pain, which lasted about fifteen minutes. During the next six days she was very unwell, and at the end of that period had a miscarriage, from which she suffered great weakness for a considerable time. About nine months after she had another miscarriage after seven months of pregnancy, and at the time of the trial was not as strong and well as before the trip to Eustace:—

Held, that having a platform at the station, the defendants were bound to bring the passenger cars up to it to permit the plaintiff to step down on it in alighting, or to provide some other safe means for passengers to alight.

There was evidence that the company's rule was that, after discharging what had to be put out of the baggage car, the train should be pulled up and stopped again when the passenger cars reached the platform. This rule was not usually complied with, and the plaintiff was not told of the rule, or asked to wait. The conductor's act was an invitation to get off when she did; and, not knowing that there was a platform at the station, she naturally supposed that her only way of alighting was to act on that invitation. *Robson v. N.E. Ry. Co.* 2 Q.B.D. 85, followed. *Lortie v. Quebec Central Railway Co.*, 22 S.C.R. 336, and *Currie v. C.P.R.* 17 O.R. 65, distinguished.

Held, 1. Plaintiff was not bound to disclose her pregnancy to the conductor, so that he might know that special care was necessary in aiding her to alight. *McGuiney v. C.P.R.*, 7 M.R. 151, distinguished on the ground that it was a weak and diseased limb the plaintiff in that case had, and on other grounds.

2. That the illness and first miscarriage and subsequent weakness suffered by the plaintiff had been directly caused by her being obliged to jump down as she did, and that she was entitled to recover damages therefor, but that the defendants were not responsible for the second miscarriage or the weakness that followed it.

Verdict for \$200 damages, with certificate for King's Bench costs, and to prevent set-off of costs.

Dubuc, for plaintiffs. *Laird*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court]

GUILBAULT *v.* BROTHIER.

[April 29.

Action involving indecent matter—Striking out—Objectionable causes of action—Form of judgment—Dismissal of action—Res judicata—Practice.

On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in

prostitution, and that the action involved the taking on an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion, and without adjudicating as between the plaintiff and defendants on the matter in dispute between them, order that this action be and the same is hereby dismissed out of this Court with costs."

Held, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim; and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection.

Judgment of IRVING, J., set aside.

Bird and Brydone-Jack, for appellant. *Martin*, K.C., for respondents.

North-West Territories.

SUPREME COURT.

Scott, J.]

LEADLEY v. GAETZ.

[Nov. 21, 1903.

Discovery of documents—Non compliance—Application to dismiss action—Failure to endorse notice on order—Rule 330.

Rule 330 requires that on every judgment or order requiring any person to do an act there shall be endorsed a memorandum in the words or to the effect following, namely, "if you the within named A. B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)."

Held, that this rule applies to orders for discovery of documents and where a copy of such an order served was not endorsed as provided, an application to dismiss the action for non compliance with the order was refused.

Crawford, for plaintiffs. *Beck*, K.C., for defendant.

Scott, J.]

EGGLESTON v. C. P. R. Co.

[Jan. 28.

Discovery—Officer of corporation—Railway company—Station agent—Section foreman—Chief clerk in office of general superintendent.

A station agent in the employment of a railway company is an officer thereof within the meaning of Rule 201 and may be examined for discovery under the provisions of that rule.

But a section foreman is not such an officer nor is the chief clerk in the office of a general superintendent.

McDonald, for plaintiff. *Newell*, for defendant.

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In recently conferring the degree of Doctor of Laws upon Hannis Taylor, both the University of Dublin and the University of Edinburgh have done one of the ablest of living publicists a deserved honour. Dr. Taylor's "Origin and Growth of the English Constitution" is one, perhaps, the very best book on the subject for the purposes of the student, and answers all requirements in ways of conciseness, lucidity and reliability, for a text-book. In 1901 he published a treatise on International Public Law, so excellent in its matter and method as to rank its author with Hall, Von Martens and Rivier, in the exposition of this abstruse subject. Dr. Taylor, at present, occupies the chair of constitutional and international law at the Columbia University, in Washington, D.C.

The legal profession as well as legal journalism have suffered a great loss in the death of ex-Judge Seymour Dwight Thompson, who died at his residence in New Jersey in August last. He was born in 1842. In 1868, after seeing service in the Civil War, he was admitted to the Bar. From 1881 to 1893 he was Associate Judge of the St. Louis Court of Appeal. Upon his retirement from the Bench he devoted much of his time to legal literary work, his best known treatises being on the Law of Negligence, a work on Homesteads and Exemptions and one on Juries. His latest and perhaps his principal contribution to legal lore was the treatise on corporations which appeared in vol. 10 of the Cyclopædia of law and procedure published by the American Law Book Company. He was recently appointed by the President of the United States a delegate to the Congress of Law and Jurists now meeting at St. Louis.

It may not be amiss to pass on, for the benefit of those whom it may concern, an illustration of the proposition, that in the management of cases in Court, counsel ought not to be permitted to do indirectly that which they would not be permitted to do directly. In the case of *Manigold v. Black River Traction Company*, 80 N.Y. Supp. 861, an action was brought by a passenger

against a carrier to recover damages for personal injury. The defendants had a policy in an insurance company to cover any loss in such cases as that in question. At the trial the plaintiff's counsel asked a question intended to elicit the fact of the insurance company being at the back of the defendant's company. The question was objected to and the objection was sustained; but the fact of the insurance necessarily came to the knowledge of the jury. The trial judge directed that all that had been said on the subject by counsel should be stricken out and disregarded by the jury. It was held that the verdict obtained under such circumstances could not be held. The learned judge who spoke for the Appellate Division, when the case was sent back for a new trial, said (we quote from the *American Law Notes*):—"The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of recovery against it on account of its negligence. This was expressly held in *Wildrick v. Moore*, 66 Hun. 630. It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action." There was a similar ruling in *Cosselmon v. Dunfee*, 172 N.Y. 507, in which case the verdict for the plaintiff was also set aside and a new trial ordered. A reference to the law as above stated is very desirable at the present time as the objectionable practice referred to by our contemporary is said to be too common in negligence cases in this country, though the rule here is the same. See ante p. 79.

The *Medico-legal Journal* of New York under the able editorial management of Mr. Clarke Bell, L.L.D., a member of the United States Bar, takes up and deals with the subject of preventive legislation in tuberculosis cases in connection with the American International Congress on this subject to be held at the St. Louis Exposition this month. This matter has been placed on the list of International Congresses, and a committee of organization of leading men of various nationalities, including this Dominion, has been appointed.

Preventive legislation in this direction is so important as to demand attention not only from the medical profession and philanthropists but also from the legislator and the lawyer. It has now become rather a legal question than a medical one. The medical

profession has done its part of the work in arousing public sentiment and educating the public mind to action and has called attention to the communicability of this dread disease, but they cannot be asked to frame laws. This branch of work necessarily demands high intelligence, large experience and special legal training.

It is most desirable that legislation should be, as far as circumstances permit, of the same character in the various countries whose governments have awakened to a sense of their responsibility in the matter. Something has been done in the Dominion, but much more remains to be done both here and elsewhere.

The circular issued by the Congress and addressed to the members of the professions of law and medicine and others states the issues that concern preventive legislation as follows:— (1) How far legislation can be devised that would arrest, avert or diminish mortality resulting from this disease. (2) How can the coming Congress devise means that will educate the public mind to the recognition of the imperative necessity of legislative action and devise its scope and field. (3) What legislation would be most likely to accomplish the desired result.

The work of the Congress has the recognition of the Government of the United States which has sent out invitations through the Secretary of State to other governments in the western hemisphere to send delegates to the Congress. We shall watch with interest what is done, and shall hope for helpful and practical suggestions for speedy legislation on this most important subject. Any suggestions that may occur to those who have studied this and kindred subjects would be welcomed by the Congress and receive due consideration.

TRUST COMPANIES.

Trust Companies have now been established for a quarter of a century in Canada; they have proved their usefulness and are well supported by the profession, but, as is pointed out by the author of "The Trust Company idea and its development" noticed in our review column, legislation has been tentative and experimental, and there is a danger that companies may be multiplied beyond the needs of the community, so that some may be compelled to depart from legitimate trustee business in order to make divi-

dends for their shareholders. Any tendency of this kind should be nipped in the bud; and it is just as much in the interests of the companies themselves as of the public that every possible safeguard should be imposed by law so as to firmly establish public confidence, for the business of the companies would be thereby increased, and the public have important interests to entrust to their care.

We might well copy some of the States across the border in having regular government inspection of the books, and we might follow the example of Australia in making directors of Trust Companies personally responsible for any misfeasance or breach of trust by the company, and in requiring a deposit of securities to be made with the government as security for the proper fulfilment of fiduciary obligations.

Of necessity wide incidental powers are given to these companies to enable them to carry on the business of executor and trustee, but they should be used only for this purpose. Trust Companies should be trust companies—expert trustees first and last, not banks, loan companies or underwriting concerns doing trust business on the side, and it should not be necessary for any solicitor to make enquiries concerning the policy of a trust company that solicits his business to ascertain whether it is safe and likely always to be safe, or whether it is properly equipped with officials who are experts in the management of estates.

The history of Australian Trust Companies is particularly interesting as a comparison to the financial departmental store of the United States. We are apt to copy the United States in many things, but if “the well earned significance and prestige which attaches to the name of trust company” in this Country is to be maintained, Canada would do well to keep her eyes on Australia.

The difficulty of limiting the number of trust companies so as not to exceed the requirements of the community is increased by the fact that Trust Companies are incorporated by the Dominion as well as the Provincial Governments. There should, as to this, be a definite arrangement between the two Governments. Our Trust Company Act needs intelligent revision; and the laws in all the Provinces should be the same. There is no excuse now for tentative or experimental legislation. We have our own experience and the experience of other countries to serve as a guide.

IMPLIED WARRANTY OF AUTHORITY.**A STUDY IN COMMON LAW DEVELOPMENT.**

“Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.”

“Whatever disadvantages,” said Sir A. Cockburn, “attach to a system of unwritten law—and of these we are fully sensible—it has, at least, the advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements of the age in which we live, so as to avoid the inconveniences and injustice which arise when the law is no longer in harmony with the wants, usages and interests of the generation to which it is immediately applied :” *Mason v. Walton* L.R. 4 Q.B. 73.

This elasticity of the common law and its capacity for growth and adaptation, so as to meet various conditions as they arise is, perhaps, nowhere better studied, or more easily seen than in the cases bearing upon the above subject, the fountain head of which is the important decision of *Collen v. Wright* (1857) 8 E. & B. 647.

The proposition affirmed in *Collen v. Wright* may be summed up in the following words of Cockburn, C.J.:—“By the law of England a party making a contract, as agent, in the name of a principal, impliedly contracts with the other contracting party, that he has authority from the alleged principal to make the contract, and if it turns out that he has not the authority, he is liable in an action on such implied contract.”

It was stated by Willes, J., thus :—“A person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does, in point of fact, exist.”

“Under the Roman law, if a person made a contract, professing to act as agent for another, who was either non-existent, or who had not, in fact, given him authority, the agent was personally liable on the contract. That contract was primarily his own, whatever he might profess; and if there was in fact no person against whom the relaxations of the law could be invoked, the professing agent remained a principal :” 18 L.Q. Rev. 365.

Early cases in England held that an agent professing to make

an agreement for a principal, when he really had no principal, or who exceeded his authority as agent, might be proceeded against in one of two ways:—

(1) He might be sued on the contract as if he were, in fact principal himself, and had made the contract as principal, without pretending to be an agent at all. In *Collen v. Wright*, supra during the argument, Watson, B., said:—"In the argument in *Jenkins v. Hutchinson* you will find a great mass of authority to shew that, in such a case as this, the person professing to be an agent is liable personally on the contract. Till that case it was generally supposed that the manner in which he might be made liable was by treating him as principal in the contract he professed to make."

The doctrine of Story that "wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for on account of his principal," was held by the Court of Queen's Bench, in an action *ex contractu*, to be "supported by numerous authorities" and "founded on plain justice:" *Jones v. Downman* (1843) 4 Q.B. 235.

(2) He might, as an alternative, be sued for damages in an action on the case for false representation. See *Randall v. Trimmen* (1856) 18 C.B. 786, and judgment of Cockburn, C.J., in *Collen v. Wright*, supra.

In neither of these forms of action did it make any difference whether he honestly believed that he had the authority of the principal to make the agreement in question or not. Fraud or dishonesty was not then considered so essential an element in an action for false representation as it is at the present day. To make an agreement, as an agent for another, when no agency existed, or when although it existed, the agreement was in excess of the actual authority, was treated as a false representation of authority, even when the party honestly believed that he had the full authority he professed to have.

The plaintiff thus had two remedies open to him.

But the situation was illogical as far as the remedy in contract was concerned. When the contract was made there was no intention that the professed agent should be treated or bound as principal, or held to performance of the contract. The intention,

evidently, was to have a contract with the principal, therefore, the court, in treating the agent as a principal, and inflicting on him performance of the contract, or damages for the non-performance of it, were making a new contract for the parties, a contract which neither of them intended to make.

As to the remedy in case for false representation there was this difficulty. It was, in effect, holding a man guilty of a wrong who might not only be perfectly honest in his intentions, but perfectly free from any blame whatever. Take for example, a case where an agent had originally authority to contract, but it turned out that, unknown to both parties, the principal had died, so that in contemplation of law, as it then stood, there existed no principal. To hold the agent guilty of false representation in such a case would be obviously unjust.

Then came *Jenkins v. Hutchinson* (1849) 13 Q.B. 744, in which the remedy in contract was expressly denied. This was an action upon a charter party, signed by the defendant as agent for another person, without authority, but innocently. The court laid down the proposition broadly that he could not be sued upon the contract, whatever other rights the other contracting party might have.

Now, as regards the remedy in case for misrepresentation, the current of authority had been steadily setting in the direction of requiring some degree of fraud or dishonesty to be shewn before a party could be treated as a wrongdoer, and be made liable for damages in tort for false representations or deceit.

To support such an action, it was held to be necessary to shew, at least, that the representation was not only not true, but also that it was false to the knowledge of the party making it or, at all events, that he did not honestly believe it to be true.

Upon this state of the authorities, where a party had contracted as agent of another, without authority to do so, the other party had no remedy unless the alleged agent had either (1) expressly warranted or promised that he had authority or, (2) unless he was aware when he made the contract that he had no authority, or did it recklessly, in ignorance of whether he had any authority or not.

If he made the contract in good faith, honestly believing that he had the authority, he could not be made liable in the absence of an express warranty that he had the authority.

In the year 1852 the case of *Lewis v. Nicholson*, 18 Q.B. 503, was decided. The court held that the defendant was not liable as principal on a contract which he had entered into in good faith as an agent, but without authority to do so. "In no case," said Lord Campbell, C.J., "where it appears that a man did not intend to bind himself but only to make a contract for a principal, can he be sued as principal, merely because there was no authority." But the court incidentally threw out the suggestion that in such a case the defendant might be liable "on an implied contract that he had authority, whether there was fraud or not."

Then came the important case of *Collen v. Wright*, (*supra*) in which this suggestion was adopted and authoritatively crystallized into a rule of law. The defendants were the executors of one Wright, deceased, who was land agent for one Gardener. Wright, in the belief that he had authority to do so, made an agreement with the plaintiff for a lease of a farm belonging to Gardener, on the strength of which plaintiff entered into possession. Gardener refused to give the lease, alleging, accurately, as it turned out, that he had conferred on Wright no authority to agree for so long a term. The plaintiff brought an action against Gardener for specific performance, which was dismissed with costs, on the ground of the absence of authority. The plaintiff then brought the present action claiming damages. The action being against personal representatives, it was necessary to plaintiff's success to establish a cause of action based on contract, in order to escape the effect of the "iniquitous maxim" (to borrow Sir F. Pollock's expression) *actio personalis moritur cum persona*, which would have been a fatal bar had the action been based upon false representation. Accordingly it was not argued that the deceased had acted otherwise than innocently, and in good faith. The Court of Queen's Bench held that the deceased was liable in damages for breach of an implied warranty, or collateral contract of his own, that he had authority to make the contract in question, and this decision was affirmed in the Court of Exchequer Chamber, notwithstanding the emphatic dissent of Sir Alexander Cockburn, C.J. "My view is" (said he), "that this implied contract, which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be

enforced, but, a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, as to a warranty of authority, which, if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment; and that to establish it by judicial decision is to make the law, which it is only our province to expound."

This decision, which has been repeatedly followed, in later cases (see II Smith's L.C., 11th ed., p. 394), dealt, it should be noticed, only with a case of contract, the action being based solely upon contract.

In *Dickson v. Reuter's Telegraph Co.* (1877) 3 C.P.D. 1, the Court of Appeal refused to extend the principle of *Collen v. Wright*, so as to support an action for damages, caused by the negligence of defendants, a telegraph company, who delivered to the plaintiff a telegraph ordering a large shipment of barley, no such message having been, in fact, sent to the plaintiff. It was held that, inasmuch as the erroneous statement was not fraudulent, and there was no duty owing by the defendants to the plaintiffs in the matter, no action would lie. It was pointed out by Bramwell, L.J., that *Collen v. Wright*, properly understood, was not an exception to the general rule at law "that no action is maintainable for a mere statement, although untrue and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it," "but establishes a separate and independent rule."

Collen v. Wright was again considered, and its principle extended in the case of *Firbank's executors v. Humphreys* (1886) 18 Q.B.D. 54, where the question arose, whether the principle of *Collen v. Wright* was restricted to cases of contract, or no. Plaintiff was a contractor who had entered into a contract with a railway company to do certain work, for which he was to be paid in cash. Subsequently to the contract he agreed to waive his right to a cash payment, and to accept part of the payment in debenture stock which was issued to him by the directors. At the time when the new agreement was made, and the certificates were issued, the borrowing powers of the company were exhausted, although the directors were not aware of this, the facts having been mis-

represented to them by the secretary of the company, and the stock given to the plaintiff was worthless. The company, subsequently, went into liquidation, and plaintiff brought this action against the directors seeking to hold them personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement. For the plaintiff it was argued that there was an implied warranty that the stock so issued was a good and binding security, and that by issuing the certificates it must be implied that the directors had affirmed that they had power to issue them. The Court of Appeal held that *Collen v. Wright* applied, and was not restricted to cases of contract.

Lord Esher, M.R., said:—"The principle of *Collen v. Wright* extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it understood that it was true, and he is liable personally for the damage that has occurred."

"Speaking generally," said Lindley, L.J., "an action for damages will not lie against a person who honestly makes a representation which misleads another. But to this general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes. The present case is within this exception, and the directors are liable to the contractor for the misrepresentation they made to him."

The rule in *Collen v. Wright* and its extension in *Firbank's executors v. Humphreys* came up for consideration by the House of Lords in the recent case of *Starkey v. Bank of England* (1903) A.C. 114, in appeal from the decision of the Court of Appeal in *Oliver v. Bank of England* (1902) 1 Chy. 610. F. W. Oliver, one of two trustees of stock, standing in their joint names in the books of the Bank of England, sold it under a power of attorney, to which the signature of his co-trustee, E. Oliver, was forged. The appellant, Starkey, was a stockbroker, who had been instructed

by F. W. Oliver to sell the stock, and who innocently acted under the power of attorney, and was allowed by the bank to transfer the stock to other persons. On the death of F. W. Oliver, the fraud was discovered, and an action was brought by the surviving trustee, E. Oliver, against the bank for restitution; to this action the appellant was made a third party upon a claim for indemnity by the bank. The action was tried before Kekewich, J., whose judgment declared that the transfers were invalid, and ordered the bank to place equivalent amounts of consols and bank stock in the name of E. Oliver in the bank books, and to pay him a sum equal to the dividends which had accrued since the transfers; and also ordered the appellant to indemnify the bank by similar transfers and payment to the bank: [1901] 1 Chy. 652.

This decision was affirmed by the Court of Appeal (1902 1 Chy. 610). An interesting criticism upon the decision of the Court of Appeal is to be found in an article in 18 L.Q. Rev. 364, the learned writer of which considers the judgments to be "wholly unwarranted by legal principles." The House of Lords unhesitatingly affirmed the decisions appealed from, and approved of *Collen v. Wright* and *Firbank's executors v. Humphrey*, holding that the principle in *Collen v. Wright* was not confined to cases where the transaction with the person representing himself to be an agent, results in a contract.

Lord Davey repeated Lord Bramwell's statement that it was a fallacy to treat *Collen v. Wright* as "an exception from the law relating to actions of deceit, that it really and truly was a separate and independent rule of law." And he added:—"As a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person." (pp. 118, 119.) The House of Lords have thus definitely established the rule that where a person, by representing that he is authorized to act for a principal, induces another to enter into a transaction, and that assertion turns out to be untrue, to the injury of that other, he must be deemed to have *warranted* the truth of the assertion. It is now "unquestionable law that an innocent agent may be liable for the consequences of a fraud, which he had no knowledge of, or means of detecting."

We thus see a doctrine, which, in 1857, was repudiated by so high an authority as Sir A. Cockburn, C.J., as a new departure and judicial legislation, definitely affirmed by the highest court in Great Britain, as an independent and unimpeachable rule of English law.

The doctrine of *Collen v. Wright* that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, has been held not applicable to a public servant acting on behalf of the Crown: *Dunn v. Macdonald* (1897) 1 Q.B. 401, 555.

"The liabilities of public agents," said Lopes, L.J., "in contracts made by them, in their public capacity, are on a different footing from the liability of ordinary agents on their contracts. In the former case, unless there is something special which would be evidence of an intention to be personally liable, an agent acting on behalf of a government is not liable for breach of a contract made in his public capacity, even though he would, by the terms of the contract be bound, if it were an agency of a private nature."

N. W. HOYLES.

Toronto.

Mr. J. C. Hamilton of the Toronto Bar has given to the public a very interesting volume, entitled, "Osgoode Hall Reminiscences of the Bench and Bar" (with illustrations). It deals mainly with men and manners anent the legal profession as it existed in old Upper Canada and Ontario. The Bar owes a debt of gratitude to Mr. Hamilton for this most interesting collection of information and incident contained in this book. It brings back to the older practitioners remembrances of days fast fading into the dim past; whilst to the younger ones it is a well written and interesting repertoire from which to learn something of the history and salient points of those with whose name they are more or less familiar. His sketches and anecdotes, some new and some old, bring these personages before us as living realities. The historical record which we have of the Bench and Bar of old Upper Canada is all too limited. Mr. Hamilton, with all his industry and research, has by no means exhausted the subject, but has laid a good foundation for himself or others to build upon.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

PRACTICE—NEW TRIAL—EXCESSIVE DAMAGES—PERSONAL INJURY—PROSPECTIVE LOSS OF INCOME.

Johnston v. Great Western Ry. (1904) 2 K.B. 250, was an action to recover damages for personal injury sustained through the negligence of the defendants' servants. The plaintiff was an engineer and at the time of the accident was earning £3 per week. He was a young man of 28, of good ability and had prospects of obtaining an appointment as engineer worth from £750 to £1,500 a year. The plaintiff proved an actual loss of salary and expenditure for medical attendance to the amount of £450. At the time of the trial the plaintiff was earning in temporary employment £2.10 a week. The jury gave a verdict for £3,000, which the defendants moved to set aside, asking for a new trial on the ground of excessive damages. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.), refused the application, at the same time saying that the rule laid down in *Praed v. Graham* (1889) 24 Q.B.D. 53 that a new trial will not be granted on the ground of excessive damages, unless the Court can come to the conclusion that the amount is so large that twelve men could not have reasonably given it, is subject to the rule laid down in other cases, where without imputing perversity to the jury the Court is able to see that they have taken into consideration matters which ought not to have been considered. The Court also approved of *Rowley v. London & N. W. Ry.* (1873) L.R. 8 Ex. 221, to the effect that, in computing damages for a prospective loss of income, the jury ought not to give the plaintiff a sum which, if invested, would produce the prospective income, but ought to take into account the accidents of life and other matters.

PRACTICE—COSTS OF APPLICATION FOR NEW TRIAL.

In *Hamilton v. Seal* (1904) 2 K.B. 262, the sole point considered is, in what way the Court should exercise its discretion in regard to the costs of a successful application for a new trial in a common

law case which ~~was~~ opposed. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) declare that there is no rule of practice that such costs should abide ~~the~~ event of the new trial, and that in the absence of special circumstances the applicant should get them.

SLANDER—CHARGE OF BRINGING BLACKMAILING ACTION—ACTIONABLE WORDS—SPECIAL DAMAGE.

Marks v. Samuel (1904) 2 K.B. 287, was an action for slander. The words complained of were that the plaintiff had brought a blackmailing action. The words were proved, but no special damage was shown; the jury however gave a verdict for the defendant. The plaintiff applied for a new trial, which was granted by the Court of Appeal (Williams, Stirling, and Cozens-Hardy L.JJ.), on the ground that the words imputed a crime and were actionable without proving special damage, and because the Judge at the trial had not properly explained to the jury the issues to be tried.

LIBEL—FAIR COMMENT—IMPUTATION OF DISHONEST MOTIVES—MATTERS OF PUBLIC INTEREST.

Joynt v. Cycle Trade Publishing Co. (1904) 2 K.B. 292, was an action for libel contained in a newspaper. The alleged libel was a discussion of a matter of public interest in which the plaintiff had been professionally concerned as a solicitor, in the course of which article the defendants imputed to the plaintiff sordid and improper motives for his action. The jury gave a verdict for the plaintiff for £500 which the Court of Appeal (Williams, Stirling, and Cozens-Hardy L. JJ.) refused to disturb, on the ground that the imputation of improper motives could not be regarded as "fair comment," such imputation not being warranted by the facts.

RAILWAY—CARRIAGE OF GOODS—CONTRACT—OWNER'S RISK.

Foster v. Great Western Ry. (1904) 2 K.B. 306, was an action for damages for delay in the carriage of goods by a railway company. The contract provided that, in consideration of the goods being carried at a less rate than ordinary, the plaintiffs relieved the defendants from all liability for delay, except upon proof that such delay arose from wilful misconduct on the part of the defendants' servants. By mistake the defendants carried the goods past the station at which they ought to have been transferred to another

train, and on discovery of the mistake, and finding that it was too late to send the goods back to the station to catch that train, the defendants forwarded the goods to their destination by another route (which was admitted to be the best alternative). In consequence, there was delay in the delivery of the goods and the plaintiff suffered damage. The County Court Judge who tried the action considered himself bound by the case of *Mallet v. Great Eastern Ry.* (1899) 1 Q.B. 309 (noted vol. 35, p. 273), but the Divisional Court (Lord Alverstone, C.J., and Wills, and Kennedy, J.J.) distinguished that case, because there the goods were forwarded by a different route to that specified, although in that case also a part of the route traversed was that intended, but Lord Alverstone significantly remarks: "I think the extent of the authority of that case, if it is supposed to lay down the principle that the condition cannot apply if the damage happens, or the injury to the goods happens, on some part of the route not contemplated by the parties at the time the condition was signed, may require further consideration," and Kennedy, J., says "I should desire to reserve any question about that case, or its correctness."

RAILWAY — CONTRACT FOR CARRIAGE OF PASSENGER — RIGHT TO BREAK JOURNEY.

Ashton v. Lancashire & Yorkshire Ry. (1904) 2 K.B. 313, was also an action against a railway company, to recover money paid by the plaintiff under protest. The plaintiff bought a return ticket from Chorley to Manchester. On the same day she started back on a train from Manchester to Bolton, but which diverged at Bolton and went on to Blackburn. No question was raised as to the plaintiff's right to travel on that train as far as Bolton. At Bolton she alighted, and half an hour after a train left Bolton for Chorley, but the plaintiff, desiring to pay a visit in Bolton, left that station and on doing so was required to give up her ticket. She left Bolton the same day by a late train for Chorley, and was charged 11½d. for the journey, which she claimed to recover in the present action. Judgment was given in the County Court for the plaintiff, but the Divisional Court (Lord Alverstone, C.J., and Kennedy, J.) set it aside, holding that the plaintiff was not entitled to stop over at Bolton, but was bound to take the next train for Chorley after her arrival at Bolton, the contract being for a continuous journey.

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 COURT OF APPEAL.

From Meredith, J.]

[April 13.]

ST. MARY'S CREAMERY CO. v. GRAND TRUNK RAILWAY CO.

Railway—Shipping bill—Bill of lading—Condition requiring insurance—Breach of—Loss of goods—Negligence.

Under s. 246 of the Dominion Railway Act, 51 Vict., a railway company is precluded from setting up a condition endorsed on a bill of lading, relieving the company from liability for damage sustained to goods while in transit, where damage is occasioned through negligence.

Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of.

Held, affirming the judgment of MEREDITH, J., that the contract being one for exemption for total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants are precluded, under the above section, from setting up the breach of such condition as aforesaid, as a ground of relief from liability. *Vogel v. Grand Trunk R. W. Co.* (1885) 11 S.C.R., followed. *Robertson v. Grand Trunk R. W. Co.* (1895) 24 S.C.R. 611, distinguished.

From Britton, J.]

[June 29.]

HEWSON v. ONTARIO POWER CO. OF NIAGARA FALLS.

Constitutional law—Statutes—Dominion legislation—Preamble—"Work for the general advantage of Canada"—Public property—Expropriation of private land.

The preamble to an act of the Dominion Parliament recited, "that it was desirable for 'the general advantage of Canada' that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the Province of Ontario, with the object of . . .," and then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts, extending beyond the limits of the Province.

Held, 1. The recital was clearly a declaration by Parliament that the work it authorized was a work for the general benefit of Canada within sub-s. 10 (c.) of s. 92 B.N.A. Act, and that the powers granted by s. 2 thereof made the work authorized, a work or undertaking extending beyond the limits of the Province within sub-s. 10 (a.) and therefore excluded it from the jurisdiction of the Legislature of the Province.

2. The power given to make the terminus of a canal in the words "above or south of the Whirlpool" did not restrict the company to the selection of a point about or near the Whirlpool and that to construe them that a point two and one half miles south of it was not within the language used would be to construe them as if they had been above *and* south.

3. As the average depth of the canal was seventeen and one half feet the company were within their rights in claiming to expropriate one hundred yards in width under s. 8 of the Dominion Railway Act, R.S.C. c. 109, made applicable to the company by s. 29 of their own Act. 50 & 51 Vict. c. 120 (D.).

4. The company had not abandoned their work as the time for completion had been extended for six years from July 7, 1900, by 63 & 64 Vict. c. 113 (D.). Judgment of BRITTON, J., affirmed.

H.S. Osler, K.C. and *Britton Osler*, for the appeal. *Walter Cassels*, K.C., and *F.W. Hill*, contra.

From Osler, J.A.] CLERGUE v. PRESTON. [June 29.
Vendor and purchaser—Offer to sell—Purchaser pendente lite—Certificate of lis pendens—Registration—Specific performance—Delay—Damages.

An appeal and cross appeal from the judgment of OSLER, J.A., reported sub. nom. *Clergue v. McKay* 39 C.L.J. 528, dismissed with costs.

Watson, K.C., for defendant's appeal. *James Dicknell*, K.C., for plaintiff's cross appeal.

From Boyd, C.] IN RE MCCRAE AND VILLAGE OF BRUSSELS. [June 29.
Municipal Corporations—Local improvement by-law—Personal service of notice—Waiver—Court of Revision.

It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1a) of the Municipal Act, 1903.

Semble, that an owner might waive such notice; but held, that in this case there was no conduct amounting to waiver.

Semble, also, that while the direction of the statute (s. 64 of the Assessment Act, R.S.O. 1897 c. 224), that the members of the Court of

Division are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void.

Order of Boyd, C., 7 O.L.R. 146, reversed.

Proudfoot, K.C., for appellants. *W. M. Sinclair*, for respondents.

From Meredith, C.J.]

[June 29.

LONDON LIFE INS. CO. v. MOLSONS BANK.

Banks and banking—Cheques—Life insurance—Fraud of agent—Payment by bank—Right of company to recover amounts paid—"Fictitious person"—53 Vict. c. 33, s. 7 sub-s. 3. (D.)

N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance—afterwards N. representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, when cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank were sent to N. whose duty it was, on the receipt to see the payees and procure discharges from them. The endorsements of the payees names were forged by N. the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were represented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company's account.

Held, in this disagreeing with the judgment of MEREDITH, C.J.C.P., at the trial, (MACLAREN, J.A., dissenting) that there was no evidence that the bank was aware that N. had any connection with the transactions out of which the cheques arose and that they were not entitled to rely on his identification of the payees or attestation of their signatures. But:—

Held, however that under the circumstances the cheques must be regarded as payable to fictitious or non existent persons and therefore, under sub-s. 3 of s. 7 of 53 Vict. c. 33 (D.), payable to bearer, and that the bank had the right to pay and charge the company with the amounts. *Governor & Co. of Bank of England v. Vagliano Brothers* (1891) A.C. 107, followed.

Per MACLAREN, J.A. By drawing the cheques payable to order, the company would be estopped from denying the existence of the payees and their then capacity to endorse. The identification of the payees or the genuineness of the endorsements would be a matter between the bank and the holders of the cheques. N.'s agency and the facts proved and mentioned in the judgment of the trial judge, without more, were not sufficient to relieve the bank from the responsibility which it voluntarily assumed.

Aylesworth, K.C., and *Edgar Jeffery*, for appeal. *Hellmuth*, K.C., and *Ivey*, contra.

HIGH COURT OF JUSTICE.

Teetzel, J.] HASLEM v. EQUITY FIRE INS. CO. [May 5.

Insurance—Loss if any payable to mortgagees—Ascertainment of lesser amount by mortgagor and company—Mortgagees refusal to accept—Action by mortgagees for amount of policy—Interest limited to the amount ascertained—Absence of fraud or collusion—Statutory conditions.

Plaintiffs were mortgagees of a certain property with a covenant in the mortgage from the mortgagor to insure for \$2,000 pursuant to which a policy was issued by the defendants to the mortgagor, the loss being made payable to the plaintiffs, mortgagees, as their interest may appear. A loss having occurred, the mortgagor and the company not being able to agree upon the amount of the loss, appraisers were appointed under statutory condition 16 (R.S.O. 1897, c. 203, s. 168) and an award made fixing the amount at \$1,012, about which the plaintiffs were not consulted. Plaintiffs refused to accept that amount and brought action to recover the \$2,000.

Held, that the effect of the covenant to insure, the application referring to the mortgage and the issue of the policy with the loss made payable to the plaintiff as their interest may appear, was to give the plaintiffs an equitable lien on the money secured by the policy to the extent of their interest, that as soon as all things had been done by the assured to make the defendants liable to pay, the money was stamped with a trust in favour of the mortgagees and they had a direct beneficial interest in and a lien upon it in the defendant's hands as soon as it became applicable to the payment of the loss, and were entitled to bring an action against the company for it. But

Held, also, that in view of the terms of statutory conditions 12 & 16, and as no fraud or collusion between the mortgagor and the company was alleged, the amount of the award as ascertained between them was "the loss, if any," to which the plaintiffs were entitled, and their rights were limited to the recovery of that amount.

O'Connell, for plaintiff. *B. Morton Jones*, for defendants.

Meredith J.]. MACDONALD v. GRUNDY. [June 2.

Chattel mortgage—Mortgage on lands as additional security—Appropriation of goods by mortgagee—Statute of limitations.

Where a mortgage on lands was given merely as additional security for the amount secured by a chattel mortgage, and on default in payment a warrant was issued under the chattel mortgage, and the goods seized and taken out of the mortgagor's possession, and, though a form of sale was gone through with, no sale actually took place; but the goods were taken possession of by the mortgagee and appropriated to his own use, and where

the statutory period had elapsed without the mortgagor's possession of the land being in any way interfered with, an attempted exercise of the power of sale under the mortgage on the lands was restrained.

E. L. Dickenson, for plaintiffs. *Proudfoot*, K.C., for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.,]

[June 3.

BANK OF HAMILTON v. ANDERSON.

Parties—Joinder of plaintiffs—Causes of action—Pleading—Lease—Action to set aside—Fraud on creditors—Right of assignee for creditor—Termination of.

One of the defendants mortgaged land to the plaintiff bank and then made an assignment under R.S.O. 1877, c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily, when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors.

Held, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff.

Semble, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors.

The order made below, 7 O.L.R. 613, was, however, affirmed.

Riddell, K.C., for plaintiffs. *Kilmer*, for defendant J.H. Anderson.

Street, J.]

EARLE v. BURLAND.

[June 3.

Costs—Appeal to Privy Council—Costs incurred in Canada—Taxation—Rule 1256—Non-retroactivity.

Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment, entitling a party to costs, was entered before the rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of the judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment.

D.L. McCarthy, for plaintiffs. *Middleton*, for defendants.

Boyd, C.]

MCDONALD v DAWSON.

[June 6.

Venue—Preponderance of convenience—Undertaking.

The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about fifty dollars in favour of a trial at that place.

Held, that this difference in expense and the fact that the cause of action arose at Welland were not sufficient to do away with the plaintiff's prima facie right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.

Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue for that would not be of any advantage until the trial was over and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point.

Judgment of Master in Chambers reversed.

A. R. Clute, for plaintiff. Douglas, K.C, for defendant.

MacMahon, J.]

[June 7.

VILLAGE OF SOUTHAMPTON, AND COUNTY OF BRUCE.

Municipal corporations—Village—Detachment of lands therefrom and annexing to township—Petition—Description of area detached and metes and bounds of new limits—Setting out in schedules.

Under s. 18 of Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions; nor is it essential that the area so detached, and the metes and bounds of the new limits, should be set out in the by-law, but they may be set out in schedules attached thereto.

Kilmer, for Southampton. J. H. Scott, for Bruce. Middleton, for Saugeen.

Divisional Court.]

[June 8.

WILLIAMSON v. TOWNSHIP OF ELIZABETHTOWN

Municipal corporations—Audit of accounts.

A person appointed by the Provincial Auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R.S.O. 1897, c. 228, to audit the accounts of a municipality, has no right of action

against the municipality for his fees and expenses until three months after the amount thereof has been specifically determined by the Provincial Auditor, with the approval of the Attorney General or other Minister, as required by s. 16 of the Act. The approval by the Attorney General of a tariff according to which the fees and expenses are made up and allowed by the Provincial Auditor is not sufficient. Judgment of BORN, C., reversed.

Du Vernet, for appellants. *Kilmer*, for respondent.

Boyd, C., Meredith, J., Anglin, J.]

[June 8.

REX v. HORNING.

Constitutional law—Powers of Provincial Legislature—Fraudulent entry of horses at exhibitions.

The Act to prevent the fraudulent entry of horses at Exhibitions, R.S.O. 1897, c. 254, is within the powers of the Ontario Legislature.

A conviction of the defendant for an offence against the Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed.

Du Vernet, for defendant. *Cartwright*, K.C., for Crown. *Masten*, for complainant.

Falconbridge, C. J.]

RAJOTTE v. WILSON.

[June 8.

Partition—Ante-nuptial settlement—Consent of life tenant.

Under an ante-nuptial settlement lands were settled in trust for successively the lives of the plaintiff, the settlor and his intended wife, and at their death to the children of the intended marriage for such estates or estate as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E.W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to, another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, but to which E. W. objected.

Held, that in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature of her consent, being a prerequisite to its maintenance.

J. Lorn Macdougall and *E. J. Daly*, for plaintiff. *T. A. Beament*, for defendant *Wilson*. *C. J. R. Bethune*, for infant and for Toronto General Trust Corporation.

Street J.] RE SERGEANT. [June 10.
Will—Executors—Discretion—Refusal of Court to interfere—Lunatic—Setting apart moneys for.

Where, under the terms of a will, executors and trustees were required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose.

Patterson, K.C., for executors and trustees. *Harcourt*, for lunatic.

Street, J.] [June 10.

KINGSTON HEAT AND POWER CO. v. CITY OF KINGSTON.

Municipal corporations—Purchase of property of light etc., company—Property subject to mortgage—Application to vary terms of—Refusal.

Where the corporation of a city acquired the property of a light, heat and power company, which was subject to a mortgage for a large sum, the Court refused, in the exercise of the powers conferred upon it by ss. 15 & 16 of the Act respecting the law and transfer of property (R.S.O. 1897 c. 119), to require the company to accept on an existing mortgage three per cent., the Court rate of interest, instead of five per cent., the rate secured by the mortgage for the unexpired period thereof, and to authorize the corporation to deduct the amount of the mortgage so computed from the purchase money.

D. M. McIntyre, for city. *Walkem*, K.C., for company. *Shepley*, K.C., for unsecured creditors. *Mickle*, for bondholders.

Anglin, J.] REX v. MCDUGALL. [June 10.

Criminal law—Speedy trial—Election—Absence of accused.

A prisoner charged with theft waived preliminary examinations and was committed for trial. Upon then being arraigned before the Junior Judge of the County Court he consented to be tried by "the said Judge without a Jury."

Held. 1. Sec. 767 of the Criminal Code, as amended by 63 & 64 Vict. c. 46 (D) contemplates an election to be tried in a certain way, and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void, and that the Senior Judge could not proceed with the trial of the accused.

2. A person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a

speedy trial and cannot make an election effectual to confer jurisdiction.

3. Unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request, and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence.

Du Vernet, for prisoner. *Cartwright*, K.C., and *Biggs*, K.C., for Crown.

Boyd, C., Meredith, J., Anglin, J.]

[June 10.

BOGART v. ROBERTSON.

Bills and notes—Joint and several—Release of co-maker—Reservation of rights—Subsequent deed—Implication.

One of five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note. There was no reservation of rights against the other makers, but the plaintiff sought to recover against one of them, upon the ground that it was intended that there should be a reservation, and that this was recognized by a subsequent instrument under seal, to which the maker who had been released was not a party but the defendant was, whereby it was stipulated that the individual liabilities and indebtedness of the defendant to the plaintiff should not be abandoned.

Held, that the defendant was discharged by the release of his co-maker, and that the effect was not changed by the subsequent instrument. Judgment of STREET, J., affirmed.

Bicknell, K.C., and *T. H. Lloyd*, for plaintiff. *Du Vernet*, for defendant Trench.

Falconbridge, C. J. K. B.]

[June 11.

IN RE KELLY AND TOWN OF TORONTO JUNCTION.

Municipal corporations—Meetings of council—Procedure—Local option by-law—Second reading without formal motion—Approval by vote of ratepayers—Motion to quash—Discretion—Delay.

A local option by-law was introduced in a town council on Oct. 5, 1903, and a motion that it be read a first time was carried, after discussion on a division of eight to two. On Nov. 17, a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On Jan. 11, 1904, the by-law was, on motion, read a third time in the council, and, also on motion, adopted as final. On April 23, 1904, a

motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of Parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council.

Held, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused.

Johnston, K.C., and *Haverson*, K.C., for applicant. *Du Vernet*, and *Raney*, for town corporation.

Street, J.]

[June 11.

RE CHANTLER AND THE CLERK OF THE PEACE, MIDDLESEX.

Criminal law—Receiving stolen property—Indictment for—Prior conviction for stealing—Right to inspect informations and depositions.

By s. 11 of R.S.O. 1892 c. 324, "A person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer."

The applicant was committed for trial at the sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous sessions three persons were convicted of having stolen cattle from C., one of whom, and two others, were also convicted at the same sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.

Held, that in such cases the question is, whether the applicant would be affected by the records which he sought to examine, and that while he might be so affected as regards the cattle stolen from C., and so entitled to the instructions asked for, he was not as regards those stolen from S.

Arnoldi, K.C., for applicant. *Cartwright*, K.C., for Clerk of the Peace.

Divisional Court.]

[June 14.

NEILLY v. PARRY SOUND RIVER IMPROVEMENT CO.

Costs—High Court—Trespass—Flooding land—Title brought in question—Verdict for \$100—Parry Sound District.

Where an action for damages for flooding and for other trespasses to the plaintiff's lands, situated in the Parry Sound district, was brought in the High Court, and the title thereto was brought in question, and, though

no evidence was given as to its value, it could not reasonably be contended that it did not exceed \$200, and clause (d) of sub-s. 2, of s. 9 of the R.S.O. c. 109, giving jurisdiction to inferior courts, where the land is under such value, not applying to such district, and the judge at the trial having found for the plaintiff and directed judgment to be entered for him for \$100 damages, with the costs of the Court having jurisdiction to such amount, without any set off, the plaintiff was held entitled to tax his costs on the High Court scale.

W. H. Blake, K.C., for plaintiff. Falconbridge, for defendants.

Anglin, J.] MASON v. GRAND TRUNK R.W. Co. [June 22.
Parties—Joinder of plaintiffs—"Series of transactions"—Common motive.

The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185 so as to enable the plaintiffs to join in one action. Judgment of the Master in Chambers, affirmed.

Raney, for plaintiffs. D. L. McCarthy, for defendants.

Divisional Court.] KAY v. STORRY. [June 15.
Division Court—After judgment summons—Committal—"Ability to pay"—Prohibition.

Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after judgment summons and was ordered to pay \$15 a month. Default having occurred he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days.

Held, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal and that prohibition would not lie. Judgment of ANGLIN, J., affirmed.

Per MEREDITH, C.J.—"Ability to pay" in sub-s. 5, s. 247 of the Division Courts Act R.S.O. 1897, c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt and contumaciously refuses to do anything.

Per ANGLIN, J.—An order for committal is not made as punishment for disobedience of a specific order for payment, and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having the means and ability to pay. It is, therefore, not necessary before a committal order can be made that there should be an

order on and after judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit.

McCullough, for defendant. *S. B. Woods*, for plaintiff.

Meredith, C.J.C.P., Street, J., Anglin, J.]

[June 29.

HOPKINSON v. PERDUE.

Evidence of assault—Circumstances of rape or indecent assault—Complaints by wife to husband after assaults—Admissibility of.

In an action for damages by husband and wife for assaults alleged to have been committed on the wife under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault.

Held, that evidence of statements and complaints made by the wife to the husband after the alleged assaults took place was properly received.

Dumble, K.C., for plaintiff. *O'Leary*, K.C., for defendant.

Divisional Court.]

MUTCHMOR v. MUTCHMOR.

[June 30.

Will—Election—Life insurance.

A testator, upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children and the other payable to his executors for the behoof of his wife and children, directed by his will his whole estate, including insurance moneys, to be divided one half to his wife and the other half to his children. By a codicil he directed that, "in lieu of the house and premises (describing them) deeded to my beloved wife, but since disposed of, and the proceeds used in the business, I give, devise, bequeath and hereby direct, instruct and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not, in fact, been disposed of, but were vested in the wife at the time of the testator's death:—

Held, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one half given by the codicil and the house; the two elements essential to a case of election being wanting, viz: the disposition by the testator of something belonging to a person taking a benefit under the will,—while in this case there was merely an erroneous statement of fact,—and a gift to that person of something in the absolute control of the testator—while the insurance money was not. Judgment of *BRITTON*, J., affirmed.

H. M. Mowat, K.C., for appellant. *Middleton*, for respondent. *Harcourt*, for infants.

Divisional Court.]

MORIARITY v. HARRIS.

[July 2.

Municipal corporations—Market clerk—Constable—Acting bona fide in supposed performance of duty—Absence of malice—Liability.

The defendant, a police constable of a city, on being directed by the clerk of the market, having the superintendence of the market grounds and buildings, and of the persons, horses and vehicles frequenting it,

acting in the supposed performance of, and with a bona fide intention of discharging his duty and without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from the position he had taken in the market place, in consequence of which a scuffle ensued, whereby the injuries complained of were caused.

Held, that no liability was imposed on the defendant in that he came within the protection afforded by the R.S.O. 1897, c. 85, which applies even to officers acting illegally, where they do so in the supposed performance of, and with a bona fide intention of discharging their duty.

MacKelcan, K.C., and *Lynch Staunton*, K.C., for appellants. *Car-scullen*, K.C., for respondent.

Divisional Court.]

[July 2.]

BROWN v. WATEROUS ENGINE WORKS CO.

Negligence—Evidence—Defect—Want of guard.

The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workshop, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform next to the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position :—

Held, MEREDITH, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard. Judgment of BRITTON, J., reversed.

Du Vernet, for appellants. *Brewster*, K.C., for respondent.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.]

[July 4.]

TURNER v. TOURANGEAU.

Division Courts—Execution against lands—Previous nulla bona return by bailiff in the court in which the judgment recovered.

Since the revision of the Statutes in 1897 incorporating sub-s. 5 of s. 8 of 57 Vict. c. 23 (O.) into s. 230 of c. 60 of R.S.O. 1897, it is not necessary to have a nulla bona return made by a bailiff of the Division Court in which the judgment was recovered before an execution against lands can be issued, a return of nulla bona by a bailiff in such Division Court being sufficient. Judgment of FERGUSON, J., reversed.

F. E. Hodgins, K.C., for the appeal. *A. H. Clarke*, K.C., contra.

Divisional Court.]

IN RE MUMBY.

[July 4.

Will—Construction—Gift during widowhood.

A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added "The real property while the said (wife) remains my widow. But in case my wife should again marry I request my executors to sell all my real and personal estate when my youngest child shall come of age, and that they, my executors, shall divide the proceeds between my six younger children." The widow did not marry again, and left a will devising all her real and personal estate:—

Held, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the case of the widows' marriage, and that the real estate passed under her will. Judgment of STREET, J., affirmed.

Kilmer, for appellants. *M. Wright*, for respondents. *D. L. McCarthy*, for Official Guardian.

Divisional Court.]

AGAR v. ESCOTT.

[July 6.

Joinder of actions—Defamation—Pleading—Striking out pleading.

The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff, as shewing no cause of action or as embarrassing was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both damages in respect of another allegation to the same effect on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R.S.O. 1897, c. 68, s. 5.

Held, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff was improper, and that this claim unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing. Judgment of BRITTON, J., as to the joinder of parties, affirmed, and judgment of ANGLIN, J., as to the pleadings, varied.

C. A. Moss, for appellant. *Middleton*, for respondents.

Divisional Court.]

BRIDGE v. JOHNSTON.

[July 7.

Indians—Indian lands—Sale of timber—Registration—Notice.

The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of

such an assignment, even though the assignment had not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of FERGUSON, J., 6 O.L.R. 370, affirmed.

Armour, K.C., for appellant. Tucker, for respondent.

MacMahon, J.]

[July 7.

GRATTAN v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Separate schools — Christian Brothers — House for teachers — Contract extending beyond a year.

The Ottawa Separate School Trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement, among other things, providing for the erection by the trustees of a house or residence with the chapel, etc., for the Brothers, and the advance of \$100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth each year; the contract to be in force for ten years unless previously put an end to by notice in a prescribed way:—

Held, that the agreement was invalid because (1) Christian Brothers, as such, are not qualified to teach in separate schools in Ontario; (2) school trustees have no authority to expend money in erecting a house for teachers; or, (3) to enter into a contract with a teacher extending beyond a year.

G. F. Henderson, for plaintiff. Belcourt, K.C., for defendants.

Divisional Court.]

BRADLEY v. WILSON.

[July 7.

Division Court—Appeal—Notice of setting down.

The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s. 158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in the Division Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal.

W. H. Blake, K.C., for appellant. Mickle, for respondent.

Divisional Court.]

LEE v. CULP.

[July 8.

Sale of goods—Ascertainment of quantity—Culling.

The plaintiff sold to the defendant all the apples of first and second quality on the trees, in the plaintiff's orchard, at a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples, when in barrels, to the railway station. There was no agreement as to the time

and mode of culling and packing, or the time for payment. The plaintiff picked the apples and placed them in piles, and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred, and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them :—

Held, that the inference from the circumstances was that the culling was to be done by the defendant, with the plaintiff's concurrence ; that until the culling took place there could be no ascertainment of the apples intended to be sold ; that the property had, therefore, not passed ; and and that the loss must fall on the plaintiff. Judgment of the County Court of Lincoln, reversed.

Middleton, for appellant. *Collier*, K.C., for respondent.

Divisional Court.] SMITH *v.* CLARKSON. [July 9.

Staying proceedings—Vexatious action—Security for costs.

An appeal by the plaintiff from the judgment of ANGLIN, J., reported ante p. 394, was argued before a Divisional Court (MEREDITH, C.J., MACMAHON, and TEETZEL, JJ.,) on the 13th of June, 1904.

The appeal was dismissed with costs, the Court being of opinion that under the circumstances set out in the judgment below, the term of giving security was rightly imposed.

F. E. Hodgins, K.C., for plaintiff. *Middleton*, for defendant.

Meredith, J.] [July 12.

BELL TELEPHONE CO. *v.* TOWN OF OWEN SOUND.

Municipal corporations—Highways—Bell Telephone Company.

The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and, in connection with the change, wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles, and the defendants refused to consent :—

Held, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent.

Held, also, that there was no justification in law for the refusal, since s. 3 of the plaintiffs' Act of incorporation, 43 Vict. c. 67 (D.), does not as was contended by the defendants, empower municipal councils to determine, as they may see fit, where and how the plaintiffs shall construct their lines.

Lynch-Staunton, K.C., for plaintiffs. *Aylesworth*, K.C., for defendants.

Divisional Court.] *MILLOY v. WELLINGTON.* [July 15.
*Husband and wife—Divorce—Foreign divorce—Crim. con.—Alienation
 of affections—Damages.*

The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained, in the United States, a divorce from him, not valid, according to the law of this Province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed \$5,000 damages, and judgment was entered for this sum:—

Held, MACMAHON, J., dissenting, that notwithstanding the separation and the divorce the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted.

Per MACMAHON, J.: The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff, and were a bar to the action. Judgment of ANGLIN, J., reversed.

Ritchie, K.C., and *Ryckman*, for appellant. *W. R. Smyth*, for respondent.

MacMahon, J.]

[July 20.

ELGIN LOAN, ETC. CO. *v.* LONDON GUARANTEE CO.
*Guarantee—Condition modifying liability—Necessity to set out in contract
 —Change in nature of business—Liability.*

By s. 144 (I.) of the Insurance Act R.S.O. 1897, c. 203, all the terms and conditions modifying and impairing the effect of an Insurance contract must be set out in full on the face or on the back thereof; otherwise the same shall have no effect; but by sub-s. 1 (a) this is not to exclude the application of the insured from being considered as part of the contract.

Where, therefore, on the application of the manager of a loan company a guarantee agreement was entered into guaranteeing the company against any loss which might be sustained in case of the defalcations of such manager, statements made at the time of the making of the agreement, not by the applicant, but by the president of the company, as to the safe-guarding of the funds, and as to there being an effective audit, which, though recited in the agreement, were not set out in full as required, cannot be set up as an answer to a claim under the guarantee.

Where, however, the guarantee provided that any change made in the nature of the business without the guarantee company's consent in writing would vitiate the agreement, and it appeared that the loan company had subsequently obtained a charter enabling them to carry on the business of buying and selling stocks, and pending the issue to them of the required license therefor, and authorized the manager to carry on such business in

his own name, and stocks were bought on margin and large losses ensued, this vitiated the guarantee and absolved the guarantee company from liability.

W. K. Cameron and Maxwell, for plaintiff. *J. B. Clarke*, K.C., and *Crothers*, for defendants.

Anglin J.]

KING v. WHITESIDE.

[July 28.

Habeas corpus—Arrest in outside county—Omission to have warrant backed—Crim. Code ss. 505, 848—Right to discharge—Reference of argument to Divisional Court—No power to direct—Jud. Act, s. 81.

The prisoner had been convicted by the police magistrate of Bowmanville of a violation of the Liquor License Act, by the sale of liquor without a license, and, it being a second offence, was sentenced to imprisonment in the common gaol of the united counties of Northumberland and Durham for a term of four months at hard labour.

On the motion for his discharge from custody on the ground that the warrant of commitment had been executed by a constable of the adjoining county of Ontario without a backing having been first procured, it was held, disapproving of *Reg. v. Jones*, decided by Robertson, J., in 1888, that a prisoner could not be released from gaol on habeas corpus for mere irregularity in the caption the warrant returned to the writ showing a valid cause of detention, and that imprisonment wrongful in the manner of the taking would, so far as relief under habeas corpus was concerned, only be vitiated where it was directed by civil process. (2) That by reason of a difference of opinion between two judges of co-ordinate authority the matter should be referred to a Divisional Court.

Sept. 20.—Upon a direction being asked from the Divisional Court (Meredith, C.J., Idington, J., Magee, J.,) as to the above reference, it was held that the jurisdiction of the Court on habeas corpus was purely statutory, and was limited to a case where the writ had been made returnable before it, instead of a Judge in Chambers.

J. W. McCullough, for the prisoner. *Cartwright*, K.C., for the Crown.

Idington, J.]

KING v. WHITESIDE.

[August 4.

Habeas corpus—Remand of prisoner to custody—Application for bail—Hab. Cor. Act, R.S.O. c. 83, ss. 1, 4.

The prisoner, confined in goal, as shown in *King v. Whiteside* above, applied to the presiding judge in chambers, by leave of the judge hearing the motion, for his discharge, to be released on bail pending the argument of the reference directed by him to be made.

Held, that, either the Judge seized of the motion or the Divisional Court was vested with power to bail, the case being one of a commitment in execution.

Quare, whether bail could be granted in the case of a commitment in execution.

Tremear, for the prisoner. *Dymond*, K.C., for the Crown.

Idington, J.]

KING v. WYNN.

[August 14.

Habeas corpus—Crim. Code s. 785 & 786—*Election to be tried by police magistrate*—*Option of trial by jury*—*Necessity of informing prisoner of date of earliest sittings*—*Further detention*—Crim. Code s. 752.

The prisoner was charged before the Police Magistrate for the City of Hamilton with theft, and, on coming before him, and being asked, how and where he wished to be tried, replied: "Now, before your Worship."

He was not informed of his right of being tried by a jury or told when the sittings of the Court, at which he might earliest be tried would occur. On objection taken by counsel after the trial, but on the day to which it had been adjourned for giving sentence, that his consent had not been validly obtained, the Magistrate declined to withhold sentence, and he was ordered to be imprisoned for two months.

On application by way of *habeas corpus* for his discharge from custody, it was held, (1) following *Rex v. Walsh & Lamont*, 7 O.L.R., that a mistrial had taken place; (2) that further detention under s. 752 of the Code was proper, but that prisoner should, within 48 hours of the service of the order, be brought before the Police Magistrate in order that he should be committed for trial for the offence at the next court of competent jurisdiction, and, in the meantime, be admitted to bail, his own bail, in the opinion of the Judge, to suffice.

Farmer, for the prisoner. *Dymond*, K.C., for the Crown.

Province of Manitoba.

KING'S BENCH.

Richards, J.]

CURLE v. BRANDON.

[June 2.

Municipal corporation—*Non-repair of bridge*—*Use of bridge by heavy traction engine*—*Notice of action*—*Meaning of "happening of the alleged negligence"*—*Misfeasance in not stopping up holes in timbers*—*Expectation of pecuniary benefit from continuance of life*.

Plaintiff was the widow and administratrix of William Curle, who was killed in consequence of a traction engine, on which he was riding, breaking through the approach to the bridge over the Assiniboine River, in the defendant municipality. She brought her action on behalf of herself, a son old enough to earn his own living, a grandson at an age to require educa-

tion and maintenance, who lived with the deceased, and was being reared as one of his family, and of a nephew and an adopted child of the deceased. It was proved that traction engines of equal weight had for some years, to the knowledge of the city officials, crossed over the bridge in question; that that bridge was the strongest one across the river for many miles; that one of the timbers in the approach had rotted more than the others in consequence of water getting into an unplugged spike hole in it, and that the bridge formed part of a public highway in the city on which work had been performed, and public improvements made by the city; also that the approach referred to was not safe for the heaviest part of the traffic which, to the knowledge of the city officials, had been passing over it for the previous two years, and that no attempt had been made to stop such traffic, or to warn those in charge of it of any danger.

Held, following *Manley v. St. Helens*, 2 H. & N. 840, and *Lucas v. Moore*, 3 O.R. 602, that under s. 667 of The Municipal Act, R.S.M. 1902, c. 116, the defendants were liable for the damages resulting from their negligence in not having the bridge and its approaches strong enough for the passage of the traction engine referred to.

Plaintiffs' counsel argued that defendants were guilty of negligence amounting to misfeasance, so as to make them liable in damages, independently of the statute, because they had not stopped up the spike hole, referred to, so as to prevent water lodging in it, and cited the case of *Patterson v. City of Victoria*, 5 B.C. 628; but the Judge distinguished that case on the ground that there an augur hole, an inch and a quarter in diameter, had been purposely bored to test the wood, and left open.

Held, also, that the notice of action required by the section quoted, to be given to the municipality need not be signed by the claimant personally, or shew that she was claiming in her representative capacity.

It was contended, on behalf of defendants, that, the negligence relied on, if proved, having existed for nearly two years, notice of the action had not been given "within one month after the happening of the alleged negligence," as required by the same section.

Held, that, to give effect to the manifest intention of the Legislature, the words quoted should be construed to read "after the happening of the injury or damages, resulting from the alleged negligence," or it might be held that the negligence continued to "happen" up to the time that the damages resulted from it, otherwise no notice of the action or claims could be given to comply with the statute, in any case, where the negligence had existed for more than a month before the injury resulted from it.

The Judge allowed the plaintiff \$2,000 for herself, \$300 for the grandson; but nothing for the son, who, in the circumstances and position of his father, had no reasonable expectation of pecuniary advantage from the continuance of the life, and nothing for the nephew or adopted child, who

did not come within the provisions of R.S.M. 1902, c. 31, or any other enabling Act.

Wilson, and *A. Howden*, for plaintiff. *Howell*, K.C., and *H. E. Henderson*, for defendants.

Province of British Columbia.

IN ADMIRALTY.

Martin, Lo. J.]

[April 13.]

VERMONT STEAMSHIP CO. v. THE ABBY PALMER.

Admiralty law—Bail—Cash deposit—Retention of pending appeal to increase salvage award—Arrest of property to answer extravagant claims.

Motion by defendant for payment out of court of security. This was a salvage action and to obtain release of his ship defendant had paid into court \$25,000.00. Plaintiff recovered judgment for \$4,200.00 and costs, and was appealing to the Exchequer Court with a view to having the salvage award increased.

Held, that as defendant was a foreign resident the excess over the amount of the judgment would not be paid out to him pending appeal, but that as the ship had been arrested to answer an extravagant claim (a practice of which the Judge disapproved) only \$6,000.00 would be retained in court pending the appeal.

W. J. Taylor, K.C., for the motion. *J. H. Lawson, Jr.*, contra.

Full Court.] IN RE COAL MINES REGULATION ACT. [April 18.]

Coal Mines Regulation Act—Employment of Chinamen—Rule prohibiting—Constitutionality of—B.N.A. Act, s. 91, sub-s. 25, and s. 92, sub-s. 10, 13—Naturalization and aliens—R.S.B.C. 1897, c. 138, s. 82, r. 34, and B.C. Stat. 1903, c. 17, s. 2.

Rule 34 of section 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, and which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines is in that respect ultra vires.

So *held* (on a question referred by the Lieutenant-Governor in Council the full court for an opinion as to the constitutionality of the rule) per HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting.

Union Colliery Co. v. Bryden (1899) A.C. 580, applied and distinguished from *Cunningham v. Tomey Homma* (1903) A.C., 151.

Per IRVING, J., the calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires*.

Wilson, A.-G., and A. E. McPhillips, K.C., for the Crown. No one contra.

Full Court.]

April 18.

BYRON N. WHITE CO. *v.* SANDON WATER WORKS CO.

Sandon Water Works Act, B.C. Stat. 1896, c. 62—Permission to divert water—Condition precedent—Trespass—Laches—Acquiescence—Costs—Appeal successful on point of law not taken below.

Appeal from judgment of IRVING, J., dismissing an action for a mandatory injunction to compel defendants to remove from plaintiffs' lands a water tank, flume, etc.

By s. 9 of the Sandon Water Works & Light Company Act (B.C. Stat. 1896, c. 62) the company was authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in Council might allow with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in Council. The company got their plans and sites approved and proceeded with the construction of a tank and flume on plaintiffs' lands for the purpose of diverting water :

Held, that the authority of the Lieutenant-Governor in Council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that plaintiffs were entitled to damages and a mandatory injunction.

Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right ; to amount to laches raising equities against the person on whose land the erection was placed there must have been some equivocal conduct on his part including the expenditure by the person erecting it.

Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful and no costs of the appeal will be allowed, but as the appellant should have succeeded at the trial he will be allowed the costs of it.

Judgment of IRVING, J., reported ante p. 163, set aside.

E. V. Bodwell, K.C., and R. S. Lennie, for appellants. S. S. Taylor, K.C., for respondents.

Full Court.]

ROBINSON v. EMPEY.

[June 15.

Bill of sale—Sale of business as a going concern—Chattel mortgage by a new firm covering book debts due to it—Whether debts due old firm included—Creditors' Trust Deed's Act, 1901.

Appeal from HUNTER, C. J., at the trial.

The firm of Vaughan & Cook sold their grocery business including all their stock in trade and book debts to Hamon & Bisson who three days afterwards gave a chattel mortgage to defendant covering the stock in trade of the grocery business and also all book debts due to Hamon & Bisson in the business carried on by them as grocers. Hamon & Bisson assigned to defendant for the benefit of creditors who afterwards removed defendant and appointed plaintiff in his place. The day after his removal defendant paid himself \$1,245.00 on account of his mortgage claim, being proceeds of book debts collected by him and originally due to the firm of Vaughan & Cook. Plaintiff sued to set aside the chattel mortgage as being a fraudulent preference and at the trial the Chief Justice held that the mortgage was good but ordered defendant to pay the \$1,245.00 into court for distribution among creditors as he held the Vaughan & Cook book debts were not covered by the description in the chattel mortgage.

Held, on appeal that the said book debts were covered by the chattel mortgage.

Quære, has an assignee a right to pay himself without consulting the other creditors.

J. A. Macdonald, for appellant. *MacNeill*, K.C., for respondent.

Full Court.]

BARRETT v. ELLIOTT

[July 29.

Contract for fire insurance—"Valid in Canada"—Meaning of policy in company not licensed in Canada—Premium paid to—R.S. Canada, 1886, c. 124, s. 4.

The plaintiff who was the proprietor of a hotel in White Horse in the Yukon Territory entered into an agreement with defendants whereby they agreed to procure fire insurance on the hotel in some office valid in Canada. Plaintiff paid part of the premium in advance and the balance when he received the policies of insurance which was for one year. The companies in which the insurance was effected were not licensed in Canada and after the expiration of the year plaintiff sued for a return of the premiums paid.

Held, that the plaintiff had contracted for insurance in a company licensed in Canada and that the premiums paid could be recovered back as upon a failure of consideration.

Judgment of DRAKE, J., reversed.

F. Higgins, for appellant. *Helmcken*, K.C., and *Belyea*, K.C., for respondents.

North-West Territories.

SUPREME COURT.

Scott, J.]

GOODE v. DOWNING.

[Feb. 9.

Master and servant—Improper dismissal of servant—Additional wages for—Jurisdiction of J. P.

A bartender employed by an hotel keeper at a monthly salary from the first of December became temporarily incapacitated through illness on the 5th of June, and procuring a substitute left the hotel returning to work on the 10th, whereupon he was discharged by his employer being paid \$10.00 for wages up to the day he had left. He claimed the balance of two months, wages for improper dismissal and on an information before a J. P. under the Master and Servants Ordinance (C. O. 1898, C. 50) which authorizes the justice to order payment of any wages found to be due by the master to the servant, was awarded five days further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice.

Held, on appeal from this order, that the hotel keeper was not entitled to discharge the bartender under the circumstances without notice, also that the latter was entitled to be paid wages up to the time of his dismissal. But, that the J. P. had no jurisdiction under the ordinance to order payment of the additional month's wages which although no doubt the measure of damages for improper dismissal, could not be said to be wages due.

Bown, for appellant. *Biggar*, for defendant.

UNITED STATES DECISIONS.

NEGLIGENCE—LIABILITY OF RAILROADS FOR INJURIES CAUSED BY TRAINS PROJECTING OVER THE PLATFORM.—Several recent cases have called attention to the difference of opinion existing among the authorities on the question of a railroad's liability for injuries caused by trains projecting over the platform of a station. In the recent case of *Lehigh Valley Railroad Co. v. Dupont*, 128 Fed. Rep. 840, the United States Circuit Court of Appeals for the second circuit held that a passenger has a right to assume that the platform is so related to the track that the train will not sweep over any part of it. This case is also supported by the cases of *Dobiecki v. Sharp*, 88 N. Y. 203, and *Archer v. Railroad*, 106 N. Y. 589, 13 N. E. Rep. 318.

A contrary view is taken in the recent case of *Norfolk & Western Ry. v. Hawkes*, 9 Va. Law Reg. 1060, where the supreme court of Virginia held that a railroad employee of intelligence whose duty it is to attend passenger trains and receive the mail pouch, and who, seeing a train approaching, stands near the edge of the depot platform, which is

twelve feet wide, cannot recover for an injury inflicted upon him by reason of being struck by the train which projected tortuously from one to ten inches over said platform. The court said: "No man is justified in placing himself near a passing train upon any such idea or presumption. It is inexcusable rashness and folly to do so. The instincts of self-preservation, the dictates of most ordinary prudence, would suggest, and even require, that every person, upon the approach of a train, shall retire far enough to avoid injury, whatever may be the speed of the train or the width of the cars. He must, at his peril, place himself where he cannot be struck by the train so long as it continues upon its track. Of course, the result might be very different where the employee, in remaining on or near the track, is acting under the instructions of the company.

CRIMINAL LAW.—Jurisdiction to impose sentence upon one convicted of crime is held, in *People ex rel. Boenert v. Barret* (Ill.) 63 L.R.A. 82, to be lost by permitting him to go at large upon his own recognizance pending a motion for new trial, and taking no further action in the case until after the expiration of several terms of court.

Book Reviews.

The Trust Company Idea and its Development, by ERNEST HEATON, B.A. (Oxon.), Barrister-at-Law. Toronto: The Hunter Rose Co., Limited. 1904.

This little work makes interesting reading for lawyers and law makers, as well as other business men. It is a concise history of the trust company movement, with special chapters given to the subject as it obtains in Canada, England, Australia, New Zealand and the United States, etc. We refer to the legal aspect of the trust companies in this country in our editorial columns.

Flotsam and Jetsam.

Judicial Salaries:—In England the Lords Justices receive \$25,000. In the commonwealth of Australia the salaries of the Supreme Court Judges have been fixed at \$17,500 and \$15,000; in Victoria at \$17,000 and \$15,000; in Queensland at \$17,500 and \$10,000; in Cape Colony at \$15,000 and \$10,000. In very small province of Tasmania the salaries are \$7,500 and \$6,000, though the population is only 175,000. In Ireland the Lord Chancellor receives \$40,000; the Master of the Rolls and the Vice-Chancellor \$20,000 each; the land Judge, \$19,500; the Lord Chief Justice, \$25,000; the Chief Baron, \$23,000; and the eight puisne Judges, \$17,500 each.

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The *Canada Gazette* of October 8th announces a number of judicial appointments. Those in Nova Scotia and British Columbia are noticed elsewhere. The vacancies in the Bench of the Superior Court of the Province of Quebec have been filled as follows: Mr. Justice Routhier takes the position of Chief Justice in the room of the Honourable Sir L. E. Casault, K.C., resigned; and Sir C. A. P. Pelletier, K.C.M.G., K.C., becomes puisne Judge in the place vacated by Mr. Routhier.

The Government has made another good selection by appointing to the bench of British Columbia Mr. Aulay Morrison, K.C., of New Westminster. The new Judge, like so many others who have come to the front in the legal profession, is a Nova Scotian by birth, having been born at Baddeck, June 15th, 1863. He graduated at Dalhousie University, and was called to the Nova Scotia Bar in 1888. Having decided to try his fortune in the west, Mr. Morrison went to British Columbia, and was called to the Bar there in 1890; practicing at New Westminster, for which district he was elected to the House of Commons in 1896, in the Liberal interest. The recipient of the honor is a man of high standing, courteous and considerate of others, industrious and intelligent, and having also the reputation of being a sound lawyer, he will, we venture to prophesy, make an excellent judge.

At the recent meeting of the Trades and Labour Congress of Canada, in Montreal, a resolution endorsing the principle of "Socialism" as an economic factor in working out the future of this Dominion was emphatically voted down, only seventeen delegates pronouncing themselves in favour of the principle embodied in the resolution. The resolution was as follows:—

"Whereas the working class are underpaid as producers, and overcharged as consumers, therefore, be it resolved that this Congress, place itself on record as being of the opinion that the only way for the working class to obtain the full benefit of their labour is the substitution of the co-operative for the competitive system of industry by the common ownership by the people of the means of production and distribution."

The president of the Congress vehemently opposed this resolution, characterizing it as "insidious," and the product of a class who are "seeking to undermine trade unionism." Other speakers deprecated the motion on much the same lines.

We feel justified in referring editorially to this incident as it shows very satisfactorily indeed that the workingmen of Canada, as a whole, may be relied on to uphold the constitutional guarantees of right and justice between man and man as they obtain in this country to-day; and that no revolutionary ideas in economics and government can find welcome lodgment in our midst. We are all socialists in the cause that Socialism means the betterment of the condition of the industrious poor; but Socialism, alas! means a great deal more than that when you sift its literature. According to Dr. Robert Michels, of Germany, there are over six millions socialists in the world to-day as compared with thirty thousand in the year 1867, an increase in the army of malcontents stupendous enough to make every patriot among us pause and think.

We learn from our English exchanges that the Dublin police seem determined to put down the reckless driving of motors in the Irish metropolis. Last week there was a batch of prosecutions as a result of which the police netted £70 as fines. The police of the metropolis of Ontario would do well to follow this good example. In Dublin according to the evidence for the prosecution the offending juggernauts were travelling at from fifteen to twenty-seven miles an hour, the defence of course making it less than half that pace. Here the speed exceeds even that of Dublin. It is time that the slaughter of the innocents by these dangerous and unsightly monstrosities should be minimized, and their recklessness controlled. In New York we are told that the inhabitants are beginning to arm themselves in defence of the lives of themselves, their wives and children, as they seem to find that the influence of the motor millionaire is too great to permit of any constitutional remedy. The farming community are also discussing some way of abating the nuisance so far as it affects them. The mangled remains of two automobile owners who were recklessly racing lately on Long Island may be a temporary warning; but that circumstances (which had its redeeming feature) will soon be forgotten. It is

intolerable that the many should be terrorized and often mangled to satisfy the whim or pleasure of the few, who thus in defiance at least of the spirit of the law dominate the public highways.

Legal periodicals in the United States are also taking up the discussion of "Reckless Automobilists." *Case & Comment*, in an article under that heading, says that in several cities the authorities have systematically begun to arrest those who violate the law. The same article in discussing the law of the road affecting this subject says: "A supposition that automobiles can run with impunity anywhere up to the limit fixed by statute or ordinance seems to be somewhat common. Of course, it is entirely erroneous. An enactment that the speed shall not exceed a fixed maximum is by no means a license to run at that speed under all circumstances. The general principles of the law of negligence necessarily require that the speed under particular circumstances should be far less than that maximum, or indeed that the machine must be entirely stopped, if common prudence demands it in order to avoid a threatened injury to another person. There is a surprising lack of adjudication in the courts, up to the present time, in respect to the use of these machines, but the principles applicable to the subject are the same as those which govern all vehicles on highways. Outside of specific enactments, the question is simply one of negligence, and in most instances this will, of course, be a matter for the jury;"—and an ordinary jury would not be likely to err in favour of the defendant.

The writer of the article above referred, deals with the existing evils in the following true and trenchant language: "Many automobiles are operated by gentlemen who run them with due consideration for the rights of other people. Many others are operated by persons who may be fitly described as wealthy hoodlums. These fellows drive their powerful machines with insolent disregard of the rights of other travellers. Women and children who have been accustomed to drive on country roadways have in many instances been practically driven from them because of this new danger. It is the custom of some of these reckless, insolent, and brutal hoodlums, swelled with the sense of their own importance and power, when they have

caused the upsetting of carriages, and seen their occupants, whether men or women, thrown into the ditch, to drive on without slackening pace, not knowing or caring whether their victims may not be seriously maimed or killed. A few experiences of this sort explain, and go far to justify, the desperate measures that in some places have been taken by rural communities for their own protection." The same remarks are applicable to cities.

A well-known and very estimable member of the profession Mr. D. A. McKinnon, K.C., formerly Attorney-General of the Province of Prince Edward Island, has been appointed Lieutenant-Governor thereof. We congratulate him upon his promotion.

MR. JUSTICE RUSSELL.

It is with very great pleasure that we learn that Benjamin Russell, K.C., has been gazetted to "a seat" on the Bench of the Supreme Court of Nova Scotia.

There is an entry in Lord Chancellor Campbell's diary, of June, 1859, to the effect that he had got himself "into great disgrace by disposing of judicial patronage on the principle of 'detur digniori.'" This was apropos of Colin Blackburn's appointment to the Queen's Bench, and while there is a salient difference between the personal history of Lord Campbell's protégé and the subject of our present observations, in respect of public notice prior to their elevation to the Bench (Blackburn's being greeted with the query, "Who is Mr. Colin Blackburn?"), yet, so far as meriting the honour goes, they are pretty much on the same ground. In the House of Lords the aforesaid query was answered by Lord Lyndhurst in these words: "I take leave to answer that Mr. Blackburn is a very learned person, a very sound lawyer, an admirable arguer of a law case, and eminently fitted for a seat on the Bench." These very words apply with much truth and fitness to the qualifications of the newest member of the Nova Scotia Supreme Court Bench. But there are two things shared in common by the two men which make the parallel we have ventured to institute between them still more complete and noteworthy, viz., the personal quality of modesty, and the fact that both learned their law in that best of all schools—the business of law-reporting. So modest was Blackburn that he always took the humblest seat at the outer

Bar, and was never numbered among the "clamorous crew seeking silk." As to Benjamin Russell's humility, one instance known to the writer will suffice. When the Law School of Dalhousie University was established Mr. Russell was appointed Professor of Contract Law. During the first term his work lay wholly within the curriculum of the junior students; but the excellence of his lectures was such that the seniors (numbering some practising barristers) sought to take the benefit of them, and one spare day mustered in force and without leave or license entered his class-room the while he was engaged in a fine exposition of the doctrine laid down in *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216, as to the completion of a contract by a posted acceptance of an offer previously communicated. The lecturer became embarrassed at this trespass on the case, so to speak, and it was thought that he concluded his observations with more expedition than circumstances would ordinarily warrant. After the class was dismissed he told a mutual friend that he experienced diffidence in lecturing to the "seniors" who, doubtless, so he said, were able to make a better apology for the doctrine than he could, and might enumerate among themselves

"Some Bramwell, guiltless of this judge-made law." (*)

It is instances of this kind that affirm the correctness of La Bruyère's saying—"Modesty is to merit, what shades are to a figure in a picture: giving it strength and elevation."

Mr. Justice Russell was born in Dartmouth, N.S., in January, 1849, and therefore brings to the Bench ripe legal experience and a variously trained mind in its prime. He is one of the most distinguished graduates of Mount Allison University (B.A., 1868; M.A., 1871; D.C.L., honoris causa, 1893). He was called to the Bar of Nova Scotia in December, 1872. Before his call he had become joint reporter of the House of Assembly with the late Sir John S. D. Thompson. For twenty years he held the office of official reporter of the decisions of the Supreme Court of Nova Scotia, and in that connection amply discharged the debt of usefulness which Lord Bacon said every lawyer owes to his profession. In 1882 he became Recorder and Stipendiary Magistrate of his native town, offices which he long discharged with ability and scrupulous care in the interests of the public. In 1883 he

(*) It will be remembered that Baron Bramwell vigorously dissented from the majority of the Court in the case above cited.

was appointed Professor of Contract Law in Dalhousie University, his lectures, as we have before pointed out, attracting wide attention, and contributing largely to the reputation of the law-course in that institution. Notwithstanding all these many drafts upon his time and intellectual energies, he yielded to the persuasion of his friends and successfully stood as a Liberal for the county of Halifax in the Dominion elections of 1896. He was also returned as member for Hants, N.S., in the elections of 1900. During his parliamentary career he made many notable contributions to the debates, and was known as one of the most fluent and forcible speakers in the House. Always a keen student of literature, during the past few years he has most acceptedly addressed audiences in Ottawa, and other important centres of culture, on literary topics. Mr. Russell, while at the Bar, had a persistent and zealous care for the interests of his chosen profession, and both in the capacity of President of the Council of the Nova Scotia Bar, and as an official of the House of Assembly, he had a large share in the promotion of the more important law reforms that have been placed upon the provincial statute-book during the past twenty years. Add to all these employments the fact that he has always been in active practice, and we have indeed the record of a busy life for a man who has not yet grown old. In February last we announced, as professional rumour then had it, that Mr. Russell was to be made the new Chief Justice of the Supreme Court of his native province. We hope that this rumour was not unfounded. "*Haud semper erret fama ; aliquando et elegit.*"

RECENT CASES AS TO WINDING UP ORDERS.

We hear now more of the failure than of the formation of companies. This is due, probably, not so much to any wave of depression as to the excessive zeal shown in the past few years in the creation of companies on an unsound basis—too much paper capital and too little cash. A small trading concern carried on successfully as a partnership blossoms into a full blown company with the hope, and often realization, of getting additional credit on the strength of its apparently large capital. There is, however, a day of reckoning, and petitions under the Dominion Winding up Act multiply apace.

The provisions of the Act may seem clear and readily applicable in the case of larger companies, but it has been found that

there may be considerable difficulty in clearly establishing an unanswerable petition against a smaller concern. All the assets of the company may have vanished so that there can be no seizure, and there have probably been no statements exhibited showing the financial position of the company. Swift action may be necessary, and it may be disastrous to wait for sixty days after serving a demand for payment, and yet how else can insolvency be proved under the Act as interpreted by the Courts?

The provisions of the Dominion Act are less elaborate than those of the English Act, and mistakes may occur from relying on the language of English authorities which have reference to the broader provisions of the English Act.

The majority of recent Canadian decisions have limited rather than expanded the scope of the Act, and, while not advocating too sweeping an enactment, an amendment may be advisable if such decisions contain a true exposition of the Act.

The main questions in preparing a petition are ;—

1. How can the company be proved to be "insolvent"?
2. What discretion can be exercised by the Court in refusing a Winding up Order?

The Winding up Act, R.S.C. c. 129, provides by s. 3 that it applies to certain companies "which are insolvent." Then s. 5, which it is desirable to quote here in extenso, provides :—

5. A company is deemed insolvent :—
 - (a) If it is unable to pay its debts as they become due ;
 - (b) If it calls a meeting of its creditors for the purpose of compounding with them ;
 - (c) If it exhibits a statement showing its inability to meet its liabilities ;
 - (d) If it has otherwise acknowledged its insolvency ;
 - (e) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat, or delay its creditors, or any of them ;
 - (f) If, with such intent, it has procured its money, goods, chattels, lands or property to be seized, levied on or taken, under or by any process or execution ;
 - (g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the

whole or the main part of its stock-in-trade or assets, without the consent of its creditors, or without satisfying their claims ;

(h) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon, or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure."

Then s. 6 enacts that "A company is deemed to be unable to pay its debts as they become due whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditors."

Is then the language of s. 6 to be considered a final and exclusive definition of the inability of a company to pay its debts as they become due under s. 5 (a) ?

The broader interpretation which might be given is that if a notice has been given under s. 6 a company must then be deemed to be unable to pay its debts and no further evidence is necessary while in cases where such a notice has not been given it is nevertheless open to petitioner to shew by other evidence that the company is unable to pay its debts. The latter has certainly been the practice in the English Courts ; but the English Act contains other sub-sections clearly authorizing an order wherever inability to pay debts is proved to the satisfaction of the Court or generally when it is just and equitable. (See ss. 79 and 80 of the Act of 1862.)

The stricter construction was favored by Taylor, C. J., in two cases: *Re Qu'Appelle Valley Co.* (1888) 5 M.R. 160, and *Re Rapid City Farmers' Elevator Co.* (1894) 9 M.R. 574. The learned Judge, however, refers to the English case of *Re Catholic Publishing Co.* (1864) 2 D. J., and s. 116, as supporting this view, while a perusal of this case would hardly justify this.

On the other hand, there are two Quebec cases which support the opposite view: *Mackey v. L'Association Coloniale* (1884) 13 R.L. 383, and *Eddy v. Henderson*, 6 M.L.R. 137. The report of

these cases is meagre as no argument or reasons are given. They are cited in White on Company Law and Masten's Company Law of Canada, and both of these learned writers seem to think that the point is unsettled.

In the Ontario Reports we find no full judgment on the point; but in the recent case of *Re Ewart Carriage Works*, 4 O.W.R. 149, Magee, J., referred to the view taken in the two Manitoba cases above cited and concurred in this view, stating also that it had apparently been taken by Proudfoot, J., in *Re Briton Medical and General Life Association*, 11 O.R. 478. The remarks, however, of Proudfoot, J., in that case would seem to be obiter.

Meredith, C. J., seems to be of the same opinion, to judge from his remarks in *Re Grundy Stove Co.*, 7 O.L.R. 252, although the main point of this case is to the effect that it is not sufficient for a company to appear by counsel and admit insolvency and consent to be wound up; the material filed must satisfy the requirements of the Act.

In view, therefore, of the above authorities it seems necessary in order to come within s. 5, (a) to give the notice required by s. 6.

This notice must require the company to pay the sum due at once. A writ of summons is not such a notice: *Re Abbott Mitchell Iron and Steel Co.* (Meredith, C. J.), 2 O.L.R. 143.

The difficulty of coming within s. 5 (b), (c) or (d) is obvious in the case of a small company. It has been held as to (d) that the president or manager of a company has not authority to acknowledge insolvency, and such acknowledgment must apparently be shewn by some Corporate Act.

The difficulty of satisfying 5 (e), (f) or (g) is likewise obvious as evidence must be given not only of the condition of affairs at the time of the petition, but also at the date of the transaction alleged to be covered by any one of these sub-sections; so also in the case of 5 (h) it is not sufficient to issue execution and show that the sheriff has made a report of nulla bona, but the sheriff must actually seize and remain in possession for fifteen days, and if there is nothing for the sheriff to seize this section is not of much value to the petitioner.

The result seems, therefore, that in very many cases the only safe course for the petitioner is to proceed under s. 6.

It must be remembered, however, that it is advisable to state all possible grounds in the petition, even though there may be no apparent evidence in support of the same at the time that the petition is launched. This does not seem very logical when the ground which may subsequently appear on the evidence is one within the knowledge of the company itself; but the authorities seem to make no exception, but to insist stringently on the rule that the issue of an order must depend on what is alleged in the petition; see *Abbott Mitchell Iron and Steel Co.*, supra, and *Re Briton Medical and General Association*, 11 O.R. 478, following the English authority on the point, *Re Wear Engine Works Co.*, L.R. 10 Ch. p. 191.

A point which has caused real or apparent conflict of decision, namely, as to the discretion of the court in granting a winding up order, has been recently dealt with by the Court of Appeal in *Re Strathy Wire Fence Co.*, ante p. 671.

It was held by Boyd, C., in *Re Maple Leaf Dairy Co.*, 2 O.L.R. 590, that the court has a discretion as to granting a winding up order (see ss. 9 and 19) and that this discretion will be exercised against the granting of an order when the assets are small and the creditors have almost unanimously entered upon an assignment for the benefit of creditors.

In this case the petitioner has relied on the decision of Meredith, C.J., in *Re William Lamb Manufacturing Co.*, 32 O.R. 243, as deciding that the petitioner has the right to an order "ex debito justitiæ." The chancellor expressed his dissent from this decision, which was to be expected in view of his judgment in *Wakefield Rattian Co. v. The Hamilton Whip Co.*, 24 O.R. 107.

In the *Strathy* case these authorities were considered by Teetzel, J., who did not give effect to the *Lamb* case and gave leave to appeal from his judgment refusing an order both as to discretion and upon the merits.

The judgment of the Court of Appeal confirming Teetzel, J., and refusing an order was delivered by Garrow, J.A., to the following effect: "The decisions in our courts are apparently conflicting, although I think the actual conflict is more apparent than real. I do not understand Meredith, C.J., (in the *Lamb* case) to say that in his opinion it is absolutely a matter of course to grant the order, no matter what the circumstances may be, nor do I understand the Chancellor (in the *Hamilton Whip* and *Maple Leaf*

Dairy cases) to say that where the facts would justify the order it is in the discretion of the court to refuse it. Some discretion must, in my opinion, be exercised in every case."

The Court of Appeal held that on the question of discretion there is no substantial difference between the Canadian and English winding up Acts and considered the English authorities to be applicable, citing the definition of "ex debito justitiæ" given by Cotton, L.J., in *Re Chappel House Colliery Co.*, 24 Ch. D. 259 at p. 268.

No reference was made to the rule laid down in the English case in *Re West Hartlepool Iron Works Co.* (1875) L.R. 10 Ch. 618, approved by Boyd, C., in the *Maple Leaf Dairy* case, to the effect that while a creditor who has made out a proper case is entitled against the company to a winding-up order ex debito justitiæ, this is not so when there is opposition on the part of other creditors.

The approved definition, however, of ex debito justitiæ implies that there is discretion in every case in the sense that proof of insolvency must be accompanied by proof of the existence of assets.

"A creditor generally when the company is insolvent is entitled to the order as a matter of right. But this assumes that a winding up order will help him to obtain payment and in a case where there are no assets which the liquidator can receive the reason fails."—Cotton, L.J., 24 Ch. D. 268.

An interesting point of practice was decided in *Re Arnold Chemical Co.*, 2 O.L.R. 671, where it was held that a petition served on November 4, 1901, and made returnable November 8, 1901, complied with the requirements "after four days' notice" and was properly lodged.

Toronto.

C. S. MACINNES.

ENGLISH CASES.

**EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.**

(Registered in accordance with the Copyright Act.)

CONTRACT—CONSTRUCTION—NECESSARY IMPLICATION.

In *Ogdens v. Telford* (1904) 2 K.B. 410, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) have affirmed the decision of Lord Alverstone, C.J. (1903) 2 K.B. 287 (noted ante vol. 39, p. 700). The action was brought for the price of goods, and the defendant counter-claimed under an agreement whereby the plaintiffs had agreed in consideration of the defendants agreeing to become customers of the plaintiffs and not enter into any agreement with any other firm which would prevent his dealing with the plaintiffs, the plaintiffs for a period of four years would distribute as an annual bonus among their customers, including the defendant, and in proportion to their purchases, a certain fixed annual sum, and also the expected profits on certain goods which should be sold by the plaintiffs during the period. Before the four years had expired the plaintiffs sold their business to a rival concern, and the defendant claimed damages for breach of the agreement. The Court of Appeal agreed with Lord Alverstone, C.J., that there was an implied agreement on the part of the plaintiffs that they would continue to carry on business and not put it out of their power to carry out their contract, and that the defendant was entitled to damages for breach of the agreement. The case throws a curious side light on the extraordinary measures nowadays adopted to secure trade.

**SHIP—CHARTER PARTY—DEMURRAGE—COMPUTATION OF TIME—FRACTION OF
A DAY.**

Yeoman v. The King (1904) 2 K.B. 429, was a petition of right claiming demurrage. By the charter party it was provided that the cargo should be "discharged at the average rate of not less than 210 tons per working day" and that demurrage should be paid at the rate of fourpence per ton per day, 'and pro rata, employed beyond the time allowed for discharging.' It was admitted that the time for discharging began to run at 6 a.m. on Monday, July

15, 1901, and that, on the assumption that a fraction of a day was to be taken into consideration, the time allowed for discharging ended at 9 a.m. on Saturday, July 27. The discharge was not in fact completed till 3 p.m. on July 29. Bigham, J., who tried the case, held that the demurrage began to run at 9 a.m. on July 27, and not from the end of that day as claimed by the Crown, and with this the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) agreed, being clear that the terms of the charter party required the fraction of a day to be taken into account in estimating the time allowed for discharging the cargo.

PRACTICE—SET OFF OF DAMAGES AND COSTS—JUDGMENTS FOR COSTS IN INDEPENDENT LITIGATIONS—JUDGMENT FOR AND AGAINST A PARTY IN DIFFERENT CAPACITIES—RULES 989, 1002 (21)—(ONT. RULES 1164, 1165.)

David v. Rees (1904) 2 K.B. 435. An application was made by the plaintiff in this case to set off the damages and costs recovered by him in this action against costs ordered to be paid by him in certain garnishee proceedings subsequently taken on the judgment to a garnishee. This garnishee was one of the defendants in the action and liable for the damages and costs recovered by the plaintiff, but he was made a garnishee as being a joint trustee with others of a fund sought to be attached, and the attaching order was set aside and the plaintiff ordered to pay the costs of the garnishee in question. The plaintiff, under Rules 989 and 1002 (21) (Ont. Rules 1164, 1165), claimed that the costs he was ordered to pay should be set off pro tanto against the damages and costs recovered by him in the action, but the Court of Appeal (Collins, M.R., and Stirling, L.J.) held that the action and subsequent garnishee proceedings were distinct and separate litigations and the Rules did not authorize the set off claimed by the plaintiff, and the application was therefore refused.

PRACTICE—CHARGING ORDER—"STOCK OR SHARES" OF A COMPANY—1 & 2 VICT. C. 110, S. 14—(R.S.O. C. 324, S. 21).

In *Sellar v. Bright* (1904) 2 K.B. 446, the plaintiff, having recovered judgment against the defendants which remained unsatisfied, applied for a charging order under 1 & 2 Vict. c. 110, s. 14 (see R.S.O. c. 324, s. 21) for a charging order on certain debentures of a limited company standing in the name of the defendants. Phillimore, J., made the order, but on the appeal of

the defendants it was set aside by the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) on the ground that debentures do not come within the words "stock or shares," and therefore are not the subject of a charging order under the Act.

NUISANCE—OVERHANGING TREES—DAMAGES—INJUNCTION.

Smith v. Giddy (1904), 2 K.B. 448, strange to say, is a case of first impression. It was an action for damages occasioned by the defendant permitting his trees to overhang the plaintiff's premises, and for an injunction to restrain him from continuing the nuisance. No precedent for such an action could be found, and the plaintiff was nonsuited in the County Court, but the Divisional Court (Wills and Kennedy, JJ.) reversed the decision and directed a new trial, holding that the plaintiff was entitled to the relief claimed and was not shut up to the remedy of himself lopping off the offending branches.

LANDLORD AND TENANT—STATUTE COMPELLING TENANT TO PAY CHARGES IMPOSED BY LOCAL AUTHORITY AND AUTHORIZING HIM TO DEDUCT SAME FROM RENT—COVENANT BY TENANT TO PAY CHARGES IMPOSED BY LOCAL AUTHORITY—DISTRESS.

Skinner v. Hunt (1904) 2 K.B. 452, is an instance of the temerity with which some suitors embark in litigation. The plaintiff was tenant of premises and covenanted with his lessor to pay any charges imposed on the premises by the local authority. A statute provided that the local authority might require a tenant to pay charges imposed by it on the demised premises, and provided that what the occupier should so pay he might deduct "out of the rent from time to time becoming due in respect of the said premises as if the same had been paid to such owner as part of the rent." Charges were imposed by the local authority and paid by the tenant. The landlord having subsequently distrained for his rent without making any deduction in respect of the amount so paid the present action was brought claiming that the distress was illegal, and that the payment to the local authority was a payment of rent. Strange to say, Ridley, J., gave judgment for the plaintiff, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) had not much difficulty in reaching the conclusion that the payment to the local authority was not a payment of "rent," but a payment of charges and expenses imposed by the local authority, and though under the statute the plaintiff had a

right to deduct the payment from his rent, yet by his covenant to pay the charges he had effectually debarred himself from exercising that statutory privilege, and his action was accordingly dismissed.

BANKER—CROSSED CHEQUE—CUSTOMER CREDITED IN LEDGER WITH AMOUNT OF CHEQUE BEFORE COLLECTION — FORGED INDORSEMENT — BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) s. 82—(53 VICT. C. 33, s. 81 (D.)).

In *Akrokerri Mines v. Economic Bank* (1904) 2 K.B. 465, an attempt was made to extend the principal of *Capital and Counties' Bank v. Gordon* (1903) A.C. 240 (noted ante vol. 39, p. 707). That case, it may be remembered, decided that where a banker cashed a crossed cheque for a customer who had no title thereto he became the holder for value and was not entitled to the protection of s. 82 of the Bills of Exchange Act (s. 81 of Dominion Act). In the present case a crossed cheque was presented to the defendants by a customer for collection. The defendants, before the cheque was collected, credited the customer with the amount of the cheque in their ledger, but it was not credited in the customer's pass book, nor was he allowed to draw against it. The indorsement of the cheque proved to be a forgery and the customer had no title, but it was not discovered until the cheque had been paid to the defendants. The defendants throughout acted in good faith and without negligence. The plaintiffs, who were the rightful owners of the cheque, claimed to recover the amount from the defendants; but Bigham, J., held that they could not succeed, that the crediting the customer in the defendants' ledger with the amount of the cheque was not equivalent to payment, and that s. 82, therefore, afforded defendants complete protection.

PRACTICE—COSTS—PAYMENT INTO COURT WITH DENIAL OF LIABILITY FOR PART, AND ADMISSION AS TO PART, OF CLAIM—ISSUE FOUND FOR PLAINTIFF.

Hubback v. British North Borneo Co. (1904) 2 K.B. 473, merely deals with a question of costs. The defendants paid into Court a sum of money, admitting part, and denying liability as to the rest of the plaintiff's claim. The amount paid in proved more than sufficient to satisfy the plaintiff's claim; but an issue raised by the defendants as to part of the plaintiff's claim was found in favour of the plaintiff. Under these circumstances, although the defendants were held entitled to the general costs of the action, the

Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) considered that the defendants should pay the costs of the issue on which the plaintiff succeeded.

LOAN ON FORGED SECURITY—VOLUNTARY PAYMENT BY THIRD PARTY TO INDEMNIFY LENDER AGAINST LOSS—RIGHT OF LENDER TO PROVE FOR WHOLE DEBT WITHOUT DEDUCTION OF VOLUNTARY PAYMENT BY THIRD PARTY.

In re Rowe (1904) 2 K.B. 483, although a bankruptcy case, involves a novel point of general interest. A bankrupt had borrowed £16,500 on a security which proved to be forged. A former partner of the bankrupt, who was in no way liable for the loan, voluntarily paid the lender £6,500 in respect of the loss which he had sustained. The lender claimed to prove for the full £16,500 against the bankrupt's estate without any deduction, and Buckley, J., held that he was entitled to do so, as the payment of £6,500 was not made on account of either the debt or the debtor, and the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed his decision.

PUBLIC AUTHORITIES' PROTECTION—LIMITATION OF ACTION—PUBLIC AUTHORITIES' PROTECTION ACT, 1893 (56 & 57 VICT. C. 61) s. 1—(R.S.O. c. 88, s. 1),

Parker v. London (1904) 2 K.B. 501, was an action brought against the London County Council for damages sustained by the plaintiff as a passenger on one of the defendants' tram cars, and it was pleaded by the defendants that they were entitled to the benefit of the Public Authorities' Protection Act, 1893, s. 1 (see R.S.O. c. 88, s. 1), and that the action was thereunder barred because not commenced within six months from the neglect complained of. The point of law was argued before Channell, J., who held that the Act applied. It may be observed that there is an important difference between the English and Ontario Acts, and that while the former Act applies not only to anything done in the performance of a public duty, as does the Ontario Act, it also expressly applies to any alleged neglect or default in the execution of any statute, duty or authority, which the Ontario Act does not. So far as actions against municipalities in Ontario, in respect of the neglect to repair roads, etc., are concerned, there is the limitation prescribed by the Municipal Act, s. 606 (1).

PROBATE—PRACTICE—UNIVERSAL DEVISEE AND LEGATEE—ADMINISTRATION OR PROBATE—EXECUTOR ACCORDING TO THE TENOR—TITLE OF ADMINISTRATOR TO REAL ESTATE.

Re Pryse (1904) P. 301, is a case that deserves attention. It was an application by the universal devisee and legatee named in a will which named no executor, for a grant of probate as executrix according to the tenor of the will. Jeune, P., upheld the Registrar's refusal to grant probate on the ground that the applicant, though universal devisee and legatee, was not on the construction of the will executrix according to the tenor; the applicant appealed, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) affirmed the decision and agreed with Jeune, P., that the applicant was only entitled to a grant of administration with the will annexed; and in doing so they lay it down that the grant when made will relate back to the death of the deceased both as to the real and personal estate.

WILL—LEGACY IN DISCHARGE OF MORAL OBLIGATION—DEATH OF LEGATEE—LAPSE.

In *Stevens v. King* (1904) 2 Ch. 30, the personal representatives of the testatrix sought the opinion of the Court as to whether or not a legacy bequeathed by the testatrix had lapsed by reason of the death of the legatee in the lifetime of the testatrix. It appeared that in her lifetime the testatrix had been overpaid her share in a deceased person's estate, and that she had submitted to appoint property in favour of W. King, who had made the overpayment, so as to recoup the amount overpaid; and that this submission had been embodied in an order of the Court; and afterwards, in pursuance of such submission, she made a will appointing the amount of overpayment in favour of W. King, who predeceased her. Falwell, J., under these circumstances determined, that as it was clear that the legacy had been given in discharge of a moral obligation it was immaterial whether there was actually any legal liability, and that the legacy did not lapse, but was payable to King's representative.

COMPANY—WINDING UP—CROSS CLAIMS BETWEEN TWO INSOLVENT COMPANIES—DAMAGES—DIVIDEND.

In *re Leeds and Hanley Theatres* (1904) 2 Ch. 45, the problem Buckley, J., was asked to solve was the proper mode of adjusting cross claims between two insolvent companies. Com-

pany A. had a claim against company B. for £5,100 on debentures of the B. company, and company B. had a cross claim for damages for misfeasance against the A. company for £4,323; both companies were insolvent and were being wound up. The learned Judge held that the claims not being mutual credits were not subject to set off, but that the proper method of distributing the assets of the B. company was to treat the claim due by the A. company to the B. company as paid, and declare a dividend on that basis; but the dividends payable to the A. company were to be set off pro tanto against the debt due by that company to the B. company until the £4,323 should be satisfied.

MARRIED WOMAN—SEPARATE ESTATE—CONTRACT—ACKNOWLEDGMENT OF LOAN—MARRIED WOMAN'S PROPERTY ACT, 1893 (56 & 57 VICT. C. 63) S. 1 (R.S.O. C. 163, S. 4)—“READY MONEY—EXECUTOR—RETAINER.

In re Wheeler, Hankinson v. Hayter (1904) 2 Ch. 66, is a decision under the Married Woman's Property Act, 1893, s. 1 (R.S.O. c. 163, s. 4), whereby the necessity of the possession of separate property at the date of a contract by a married woman was dispensed with. In the present case a married woman, prior to the Act of 1893, having no separate property, had contracted a loan; after the Act, she acknowledged her indebtedness for the amount of the loan, but it was held by Warrington, J., that acknowledgment did not create binding on her. Another question in the action was, whether the executor of the deceased lender could retain the share the married woman was entitled to as one of the next of kin of the lender to satisfy the loan, but Warrington, J., held, that as there was no legally enforceable debt due to the estate, he could not. The case may also be noted for the fact that the learned judge determined that money on deposit at a bank, withdrawable at fourteen days' notice, is not “ready money,” following *Mayne v. Mayne* (1897) 1 I.R. 324.

PRACTICE—PARTIES—LEGAL ESTATE GOT IN PENDENTE LITE—EQUITABLE ASSIGNEE—LEGAL OWNER NOT A PARTY.

In *Bowden's Patents v. Herbert* (1904) 2 Ch. 86, the plaintiffs being equitable assignees of a patent, commenced an action to restrain infringement, without making the legal owner a party. Pending the action they obtained an assignment from him of the patent. Warrington, J., held, that at the date of the writ the

action was defectively constituted, and that, as in the absence of the legal owner of the patent a decision in favour of the defendant would not protect him against an action by the patentee, the action was defectively constituted, and that it was necessary for the plaintiffs to add the legal owner's representatives as parties, he having died; and the defendants were given liberty to amend their defence and the plaintiffs were ordered to pay the costs of the day and any costs thrown away by reason of the amendment.

VENDOR AND PURCHASER—PURCHASER'S INTEREST IN LAND—JUDGMENT CREDITOR OF PURCHASER—RECEIVER OF PURCHASER'S INTEREST—NOTICE—RESCISSION OF CONTRACT ON MONEY PAYMENT TO PURCHASER.

Ridout v. Fowler (1904), 2 Ch. 93, was an appeal from the decision of Farwell, J. (1904) 1 Ch. 658 (noted ante p. 459). The Court of Appeal (Williams, Romer, and Cozens-Hardy, LJJ.) agreed with Farwell, J., and dismissed the appeal, holding that the £110 paid to the purchaser on the rescission of the contract to get him to give up possession was not paid in respect of any interest which the purchaser had in the property, and therefore it was not exigible by the plaintiff as execution creditor of the purchaser.

WILL—CONSTRUCTION—CONTINGENT REMAINDER OR EXECUTORY DEVISE—REMOTENESS.

In re Wrightson, Battie-Wrightson v. Thomas (1904) 2 Ch. 95 is one of those cases which shew how a testator may succeed in defeating his intentions in his endeavour unduly to tie up his estate. By the will in question the testator devised his estate to certain persons successively in tail; but by a codicil he directed "that no devisee or appointee of my real estate devised and appointed . . . shall have a vested interest therein . . . or be entitled to possession of the same . . . until the attainment of the age of twenty-four years." This provision Farwell, J., decided had the effect of converting the previous dispositions of the will into executory devises which failed for remoteness, and consequently that there was an intestacy.

COMPANY—ISSUE OF SHARES AT A DISCOUNT—ISSUE OF DEBENTURES AT A DISCOUNT—OPTION TO TAKE FULLY PAID SHARES IN EXCHANGE FOR DEBENTURES ISSUED AT A DISCOUNT.

Mosely v. Koffyfontein Mines (1904) 2 Ch. 108, was an action by a shareholder of a company on behalf of himself and all other shareholders to restrain the company from issuing debentures at a

discount, with an option to the holders to take fully paid shares for the nominal amount of the debentures. Buckley, J., refused a motion for an interlocutory injunction, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), being of the opinion that the issue of the debentures on the terms proposed might be used as a means for issuing shares at a discount, held that the plaintiff was entitled to relief, and granted the injunction. In coming to this conclusion Williams, L.J., disclaimed any intention of impugning the prior decisions which established that the obligation of a shareholder to pay the full nominal value of his shares need not be satisfied in cash, but might be satisfied in money's worth; but he also took occasion to say that he thought that it was deserving of the grave consideration of the Legislature whether it was not for the advantage of the public that the full nominal value of shares should be paid in cash and nothing else.

SEPARATION DEED — SETTLEMENT BY SEPARATION DEED ON EXISTING CHILDREN—RESUMPTION OF COHABITATION.

In re Spark, Spark v. Massey (1904) 2 Ch. 121, was an appeal from the decision of Kekewich, J. (1904) 1 Ch. 451, (noted ante p. 378), but on the appeal being opened the parties agreed to compromise the matter by a declaration that the settlement made by the separation deed in favour of the then existing children of the marriage should be extended in favour of all the children of the marriage whether born before or after the separation, and the Court of Appeal approved and confirmed the compromise.

PRACTICE—PARTIES—ELECTION TO AMEND BY ADDING PARTIES—APPEAL.

Bowden v. Smith (1904) 2 Ch. 122. At the trial of this action, which was for the infringement of a patent, Warrington, J., was of the opinion that the action was defective because the legal owner of the patent was not before the Court, and the plaintiffs thereupon asked and obtained leave to amend. From this order the plaintiffs appealed, but the Court (Williams, Romer, and Cozens-Hardy L.JJ.) held that as the plaintiffs had elected to amend instead of having the action dismissed there was no order against which they could appeal. See *Monro v. Toronto Ry. Co.* 4 O. L. R. 36; 5 O.L.R. 483.

PRIVATE AOT - STATUTORY AGREEMENT TO REFER TO ARBITRATION—OUSTER OF JURISDICTION—OBJECTION TO JURISDICTION NOT PLEADED.

In *Crosfield v. Manchester Ship Canal Co.* (1904) 2 Ch. 123, the defendants at the trial of the action took the objection that under the provisions of certain statutes the matters in dispute between themselves and one of the plaintiffs were required to be referred to arbitration, and that consequently the Court had no jurisdiction as regards the claim of that plaintiff. This objection was not raised by the pleadings, and Byrne, J., at the trial, overruled it, but the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.) decided that it was entitled to prevail, and that the pleadings should be treated as amended, and that the action should be dismissed so far as the plaintiffs were concerned to whom the objection applied, and as to the other plaintiffs to whom the provision did not apply, but whose rights were dependent on those of their co-plaintiffs, that it should be stayed till further order.

SOLICITOR AND CLIENT—TAXATION OF COSTS BY THIRD PARTY—MORTGAGEE'S COSTS.

In *re Longbotham* (1904) 2 Ch. 152. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) following *Re Gray* (1901) 1 Ch. 239, and affirming Kekewich, J., decided that where a mortgagee's costs are taxed at the instance of a mortgagor, or other third party liable to pay, items which the mortgagor is not liable to pay ought not to be allowed, notwithstanding that the mortgagee might be liable therefor.

TENANT FOR LIFE AND REMAINDERMAN—LOSS ON INVESTMENT—APPORTIONMENT—DEFICIENT SECURITY.

In *re Atkinson, Barber's Co v. Grose-Smith* (1904) 2 Ch. 160. A security in which a tenant for life and a remainderman were interested having proved deficient, the question arose as to the proportion in which the amount realized from the security should be apportioned between them. Kekewich, J., held that the amount due to them respectively for arrears of income and capital should be ascertained, and the amount realized should be divided in the proportion which the amount due for arrears of interest bore to the amount due in respect of capital, and this the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) agreed was correct.

**AUCTIONEER — IMPLIED AUTHORITY OF AUCTIONEER TO SELL WITHOUT RESERVE—LIMITATION OF AUTHORITY OF AUCTIONEER UNKNOWN TO BUYER
—NOTE IN WRITING—AUCTION—LIABILITY OF PRINCIPAL—STATUTE OF FRAUDS.**

In *Rainbow v. Hawkins* (1904) 2 K.B. 322, the plaintiff had attended a sale by auction of a pony. The defendant was the auctioneer, and disclosed the name of the vendor, and inadvertently stated that the sale was without reserve, whereas in fact his instructions were to sell subject to a reserve price of £25. The plaintiff bid £15 15s., and the pony was knocked down to him. The defendant immediately after discovered his mistake, and put the pony up for sale again, and bought it in for the vendor. No note in writing was made of the sale to the plaintiff. The plaintiff claimed delivery of the pony or damages for its detention, or alternatively damages for breach of warranty by the defendant of authority to sell the pony. The County Court Judge dismissed the action, holding that the absence of a note in writing was a good defence to the first head of claim, and, as to the second ground, that, the principal having been disclosed, the defendant was not personally liable. The Divisional Court (Lord Alverstone, C.J., and Wills, and Kennedy, J.J.) affirmed the decision, but not altogether on the same grounds. They agreed with the County Court Judge that the absence of a note in writing was a good defence to the plaintiff's claim as purchaser. On the second ground of claim, however, they considered that the fact that the principal had been disclosed was not necessarily a bar to an action against the auctioneer, but they held that there is an implied authority to an auctioneer to sell without reserve, and that the principal cannot repudiate a sale without reserve, on the ground that the auctioneer has exceeded his private instructions which were not communicated to the buyer; therefore they held that (but for the want of a note of writing) the contract of sale to the plaintiff would have been binding on the vendor, consequently there was no breach of warranty of the defendant's authority to sell.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court] GILLETT v. LUMSDEN. [June 29.
Trade Mark—"Cream Yeast"—Validity—Infringement—Trade name—
"Passing off."

Held, 1. The plaintiff's trade mark for a certain kind of yeast consisting of a label bearing the representation of the head and bust of a woman with the words "Dry" and "Hop" on either side and the words 'Cream Yeast' below, was properly registerable and valid. *Provident Chemical Works v. Canada Chemical Co.*, 4 O.L.R. 545, followed.

2. The defendants, by selling yeast in packages labelled "Jersey Cream Yeast Cake", the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark. *Cochrane v. McNish*, 13 R.P.C. 100, distinguished.

3. The defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff.

Judgment of a Divisional Court, 6 O.L.R. 66, affirmed.

Bicknell, K.C., for appellant. *Shepley*, K.C., and *F. C. Cooke*, for respondents.

From Drainage Referee.] [Sept. 10.
MCGILLIVRAY v. TOWNSHIP OF LOCHIEL.

Water and watercourses—Drains—Increasing flow of natural stream—Ditches and Watercourses Act—Outlet—Engineer's award.

The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who by proceedings under the Ditches and Watercourses Act obtain an outlet to the stream, and they are liable to a person injured by the increased amount of water.

A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and if the outlet chosen by the engineer is not in fact a proper

outlet his award is no protection to the persons acting under it as against a person not a party to it.

Judgment of the Drainage Referee varied.

Matthew Wilson, K.C., *Tiffany*, and *Costello*, for appellant. *Leitch*, K.C., for respondent.

HIGH COURT OF JUSTICE.

Boyd, C., Meredith, J., Idington, J.]

[June 7th.

LUCAS *v.* HOLLIDAY.

Sheriff—Interpleader—Seizure of goods—Interest of execution—Debtor as co-owner—County Court Appeal—Proceedings not certified.

A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein.

Held, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any and if so what interest in the hay and oats seized.

MEREDITH, J., dissented, and was also of opinion that the case (on appeal from an order in a County Court action) was not properly before the court because the proceedings had not been certified.

E. G. Porter, for the sheriff and execution creditor. *R. C. Clute*, K.C., for the claimant.

Teetzel, J.]

MIALL *v.* OLIVER.

[June 10.

Warehousemen—Damage by rats—Goods lost or stolen—Dampness.

Goods consisting of household furniture, were stored under lock and key in a separate compartment of a brick warehouse, but were afterwards removed by the warehousemen, without the owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boathouse and part of which was used as a stable:—

Held, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, existence of which the warehousemen were aware, and they were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt, which relieved them from responsibility for loss or damage caused by irresistible force, or inevitable accident or from want of special care or precaution; but they were not liable for damage

caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage.

May, for plaintiff. *Code*, for defendant.

Street, J.]

WEBER v. TOWN OF BERLIN.

[June 22.

Nuisance—Injury to farm by sewage—Liability of municipal corporation—Fouling natural stream—Damages.

The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorized by the Municipal Act to undertake and carry out the works, were not authorized to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germ came to connect with their system of sewage, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection.

The elements of damage in such a case were considered, and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for the loss of pasture, and for the pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiff's property, the defendants were held liable to make the loss good.

Aylesworth, K.C., and *C. A. Moss*, for defendants. *Riddell*, K. C., and *C. P. Smith*, for plaintiffs.

Falconbridge, C.J.K.B., Street, J., Britton, J.]

[June 28.

IN RE GRANT AND ROBERTSON.

Overholding Tenants Act—Negotiations for new tenancy—Failure to agree—Tenancy at will—Notice to quit—Demand of possession—Jurisdiction of County Court Judge.

Upon a review of proceedings taken under the Overholding Tenant. Act, R. S. O. 1897, c. 171:—

Held, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting that an agreement would be arrived at.

The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without any further demand of possession.

Held, that the tenant was, after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act.

Aylesworth, K.C., for tenant. *Middleton*, for landlord.

Boyd, C., Meredith, J., Anglin, J.]

[June 30.

O'CONNOR v. CITY OF HAMILTON.

Way—Non-repair—Negligence of municipal corporation—Notice of accident—Reasonable excuse for want of—Knowledge of corporation—Prejudice—Appeal from ruling of trial judge.

In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19, (O.), is subject to appeal.

The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident.

Held, MEREDITH, J., dissenting, reversing the judgment of MEREDITH, C. J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of MEREDITH, C. J., that the defendants had not thereby been prejudiced in their defence.

Armstrong v. Canada Atlantic R. W. Co., 2 O. L. R. 219, 4 O. L. R. 560, applied and followed.

W. Bell, for plaintiff. *MacKelcan*, K.C., for defendants.

Anglin, J.]

IN RE COHEN.

[July 23.

Criminal law—Extradition—Recovery of stolen property—Evidence—Inference—"Money, valuable security or other property"—Ejusdem generis.

Upon a motion for the discharge of a prisoner committed for extradition no evidence can be considered except that upon which the prisone

stands committed, and into the weight of that evidence or even its sufficiency to sustain the charge no enquiry can be made.

The fact of the silence of a person accused of receiving stolen property upon hearing statements made as to his alleged guilt by the person who stole the property is admissible in evidence as leading to the inference of his guilty knowledge.

Having regard to the interpretation clauses of the Extradition Act, R.S.C. 1886, c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States come within the Act.

The words "other property" used in that arraignment as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained" must be construed as relating only to things of the same type as "money" or "valuable security" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody.

Masten, for prisoner. *Washington*, K.C., for private prosecutors.

Anglin, J.]

EDWARDS v. COLE.

[July 25.]

Motion for judgment—Admissions—Pleading—Con. rules 259, 261, 616.

Consolidated Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of fact pleaded in the defence.

A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted.

C. A. Moss, for plaintiff. *W. H. Blake*, K.C., for defendant.

Teetzel, J.]

IN RE KIRKBY AND ALL SAINTS CHURCH.

[Sept. 9.]

Church of England—Diocese of Toronto—Churchwardens—Agreement to repay rector's expenditure.

An agreement by the churchwardens of a congregation of the Church of England in the Diocese of Toronto raising funds by voluntary contributions to repay the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 Vict. c. 89 (O.)

An order was made for the enforcement of an award made in pursuance of the agreement although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied.

Daw v. Ackerill (1898) 25 A.R. 37, distinguished,

R. B. Henderson, for applicant *Middleton*, for churchwardens.

Boyd, C., Meredith, J., Idington, J.]

[June 30.]

McINTOSH v. FIRSTBROOK BOX CO.

Master and servant—Injury to servant—Employment of child in factory—Factories Act—Misrepresentation as to age—Dangerous machinery—Warning—Negligence—Jury.

The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there was dangerous machines, he was injured by one of them.

Held, MEREDITH, J., dissenting, that the provision of the Factories Act, R. S. O. 1897, c. 256, s. 3, that no child (as defined by s. 2, sub-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age, and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence.

Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff—having regard to his age and the danger of the place.

Bicknell, K.C., and *Bain*, for plaintiff. *Shepley*, K.C., and *Grier*, for defendants.

Anglin, J.]

IN RE DEWAR AND DUMAS.

[July 7.]

Overholding tenant—Notice of hearing affidavit—Prohibition—Waiver—R.S.O. 1897, c. 171, s. 4.

On an application under the Overholding Tenant Act by a landlord for possession a copy of the affidavit filed on the application was not served on the tenant as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—

Held, that the failure to serve a copy of the affidavit was an irregularity, which could be and had been waived, and prohibition against the enforcement of the order for possession was refused.

D. O. Cameron, for the tenant. *Roche*, for the landlord.

Divisional Court.]

IN RE WOODALL.

[August 6.

Limitation Act—Execution—Renewal.

An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff even though it has been duly renewed from time to time and kept in force continuously, and sale proceedings cannot be taken under it after that time.

Judgment of STREET, J., affirmed.

G. C. Campbell, for appellant. Vickers, for respondent. H. C. Fowler, for administrator.

Divisional Court.] MORTON v. GRAND TRUNK R. W. CO. [August 6.

Executors and administrators—Negligence—Fatal Accidents Act—Conflicting claims.

A woman claiming to be the widow of a man killed owing as alleged to the negligence of the defendants brought an action against them with her two children as co-plaintiffs to recover damages. Subsequently another action was brought by another woman also claiming to be the deceased's widow to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff:—

Held, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it, the plaintiff in the second action to be represented by counsel at the trial if desired. Judgment of FALCONBRIDGE, C.J.K.B., reversed.

D. L. McCarthy, for defendants. Falconbridge, for plaintiffs in first action. D'Arcy Tate, for plaintiffs in second action.

Province of Nova Scotia.

SUPREME COURT.

Weatherbe, Ritchie, Townshend, JJ.]

[Nov. 23, 1903.

THE KING v. OLAND (NO. 1).

Liquor license—Exposing license in warehouse—Brewer's license not included in N. S. law, s. 55—Stated case by magistrate—Summary Convictions Act, R.S.N.S. 1900, c. 161, s. 73—Liquor License Act, R.S. N.S. 1900, c. 100, ss. 115, 127, 149, 182.

1. A wholesale brewer's license under the N.S. Liquor License Act need not be kept exposed in the warehouse, and is not subject to the requirements of s. 55 of the Act.

2. Notwithstanding s. 127 of the N.S. Liquor License Act a case may be stated by a stipendiary magistrate to the Supreme Court in respect of a question of law arising on a prosecution under the Act.

T. Notting, for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Weatherbe, Ritchie, Townshend, JJ.]

[Nov. 23, 1903.]

THE KING *v.* OLAND (No. 2).

Liquor License — Brewers and distillers — "License sign" over doors not required—R.S.N.S. 1900, c. 100, ss. 14, 56.

Brewers licensed as such under the N. S. Liquor License Act are not subject to the regulation (s. 56) requiring a "license sign" to be exhibited over the door of the premises.

T. Notting, for prosecutor. *W. B. A. Ritchie*, K.C., for defendant.

Province of New Brunswick.

COUNTY COURT OF ST. JOHN.

Carleton, Co. J.]

THE KING *v.* LITTLEJOHN.

[Sept. 13.]

Prize fight—Offence of engaging in, as a principal—"Sparring" exhibition—No intent to continue contest until one incapacitated—Cr. Code, ss. 92, 97.

1. A sparring match with gloves, under Queensberry or similar rules, given merely as an exhibition of skill and without any intention to fight until one is incapacitated by injury or exhaustion, is not a "prize fight" under Code section 92.

2. To constitute a "prize fight" there must have been a previous arrangement for a "fight" in the ordinary sense of the term, and that involves an intention to continue the encounter until one or the other of the combatants gives in from exhaustion or from injury received.

E. S. Ritchie, for accused. *Skinner*, K.C., for prosecution.

Province of British Columbia.

SUPREME COURT.

Full Court.] ALASKA PACKERS' ASSOCIATION v. SPENCER. [July 29.

New trial—Directions to jury—Obligation of a judge to apply facts to law—Suitor's right to have questions submitted to jury—Exclusion of jury during exceptions to charge—Mode of trial—Scientific investigation.

In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined :—

Held, that the charge was incomplete and was misunderstood by the jury, and that there must therefore be a new trial. The judge is bound to submit questions to the jury if requested to do so.

Per HUNTER, C. J. 1. A jury is not suited to try a dispute involving questions as to what were the proper nautical manoeuvres to be performed under peculiar conditions, and the new trial should be held before a judge without a jury.

2. The court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.

Per MARTIN, J. 1. It is the duty of the judge under section 66 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence.

2. The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the judge.

3. The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right.

Judgment of IRVING, J., set aside and new trial ordered, DRAKE, J., dissenting.

Bodwell, K.C., for appellant. *Davis*, K.C., and *C. E. Wilson*, for respondent.

COUNTY JUDGE'S CRIMINAL COURT.

Irving, J.]

THE KING v. ROYDS.

[March 31.

Assault—Evidence—Confession to person in authority—Alleged assault by choir boys while going to choir meeting—Investigation by church authorities—Answers of accused elicited as for that enquiry only—Onus of proving statement was voluntary.

1. The rector of a cathedral is a person in authority over the choir boys with respect to the investigation of an alleged assault committed by them while on the way to a meeting of the choir, and answers of a choir boy elicited by the rector and the choirmaster upon such investigation and stated to be only for the purpose of that enquiry, are not admissible in evidence against the choir boy afterwards prosecuted for the assault without proof that the statement was voluntarily made.

2. The onus of proving that the alleged confession was a voluntary one is upon the Crown.

Eberts, K.C., and R. H. Pooley, for Crown. J. H. Lawson, jr., for prisoner.

Bole, Co. J.]

THE KING v. TELFORD.

[Sept. 6.

Manslaughter—Preliminary enquiry for murder—Motion of Crown to commit for manslaughter—Election of speedy trial—Subsequent application of Crown to substitute murder charge—Jurisdiction of County Judge's Criminal Court—Circumstantial evidence—Rules as to sufficiency—Cr. Code, ss. 227, 230, 236, 765, 767.

1. After a committal for trial at the instance of the Crown upon a charge of manslaughter and arraignment thereon under the speedy trials clauses and election of the accused for speedy trial without a jury, the proceedings in the County Court Judge's Criminal Court will not be stayed at the instance of Crown to enable a charge of murder to be substituted.

2. In order to justify a finding of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any other reasonable hypothesis than that of guilt.

Maclean, for Crown. Martin, K.C., and Bowser, for prisoner.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

TORONTO RAILWAY COMPANY v. CITY OF TORONTO.

Assessment and taxes—Cars of Electric Railway Company—Real estate—Fixtures—Jurisdiction of Court of Revision—Res judicata.

The cars of an Electric Railway Company are not land, within the meaning of the Ontario Assessment Act, R.S.O. (1897) c. 224, and are therefore exempt from assessment under s. 39 (2) of that Act. *Bank of Montreal v. Kirpatrick*, 2 O.L.R. 119, considered.

Where the appellants appealed from the assessment to the Court of Revision and from that Court to a Board of County Judges constituted under the Assessment Act, and from the decision of that Board to the Court of Appeal, which Courts severally confirmed the assessment.

Held, in an action to restrain the collection of taxes, that said Courts had no jurisdiction to confirm an invalid assessment, and that the matter was not res judicata notwithstanding ss. 72 and 84 of the Assessment Act.

Judgment of the Court of Appeal reversed.

[Lord Davey, Lord Robertson, and Sir Arthur Wilson.—August 5.]

The Assessment Commissioner of the City of Toronto in 1901 assumed to assess the Toronto Railway Company for the sum of \$1,543,281.00 "on the real property, consisting of rails, poles, ties, wires cars and other plant and material, being part of its railway system in and upon the streets, roads and other public places and elsewhere in the City of Toronto." The Toronto Railway Company appealed against the assessment to the Court of Revision in so far as it assumed to assess the cars of the Company as real estate. The Court of Revision confirmed the assessment. The Company then appealed to a Board of County Judges under the Assessment Act, and the Appeal was heard by their Honours, Judge McDougall, Judge McGibbon and Judge McCrimmon on November 2, 1901. The value of the cars was agreed upon for the purpose of the appeal at \$450,000.

The Railway Company then appealed to the Court of Appeal for Ontario pursuant to s. 84 of the Assessment Act, R.S.O. (1897) c. 224. The Court of Appeal dismissed the appeal.

By s. 84 (6) of the Assessment Act it is provided that the Appeal shall be heard by three or more judges of the Court of Appeal and the decision of such judges or a majority of them shall be final.

In 1902 the defendant corporation passed a by-law assuming to levy taxes upon the Railway Company in respect of the said assessment. The Railway Company refused to pay to the Corporation the amount of taxes in respect of the cars. On October 31, 1902, the collector of taxes attempted to collect the amount due in the usual way. This action was then brought.

The action was tried on March 2, 1902, before Ferguson, J. The plaintiffs' counsel admitted that he could not distinguish the previous decisions and the action was thereupon dismissed. The plaintiffs then appealed to the Court of Appeal and on the admission of counsel that the previous decisions could not be distinguished, the appeal was dismissed.

The appellants then appealed to His Majesty in Council, and the appeal was heard on July 14, 1904, before Lord Davey, Lord Robertson, Sir Arthur Wilson and Sir Henri Taschereau, but the latter took no part in the judgment.

Haldane, K.C., and Bicknell, K.C., (of the Canadian bar) for the appellants. There are two points:—(1) Whether the cars are chattels; (2) Whether the matter is *res judicata*. The statutes necessary to be referred to are:—R.S.O. (1897) c. 224, s. 2 (9), 6, 7 (20), 13, 39, 68, 71, 84 (6); R.S.O. (1897) c. 223, ss. 402, 403, 405. The jurisdiction of the Court of Revision is confined, under s. 68 of the Assessment Act, to complaints in regard to "persons wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum." If the cars were not assessable as real estate there was no jurisdiction to tax them, and the decisions upon the appeals from the assessment do not conclude the matter: *Great Western Railway Co. v. Rouse*, 15 U.C.R. 168; *Nickle v. Douglas*, 37 U.C.R. 51; *Toronto Street Railway Co. v. Fleming*, 37 U.C.R. 116; *City of London v. Watt*, 22 S.C.R. 300; *Milward v. Caffin*, 2 W. Bl. 1329. The decision that the cars were fixtures followed the reasoning of the Court of Appeal in *Bank of Montreal v. Kirpatrick*, 2 O.L.R. 113, 119. That case is distinguishable. There the mortgage included the rolling stock and assumed to transfer the assets of the Company as a going concern to the trustees for debenture holders. The cars are not fixtures. There was no land to which they were affixed: *Wake v. Hall*, 8 A.C. 195; *Leigh v. Taylor*, (1902) A.C. 157; *Helliwell v. Eastwood*, 6 Ex. 295; *Holland v. Hodgson*, L.R. 7 C.P. 388.

C. Robinson, K.C., and Fullerton, K.C., (both of the Canadian bar) for the respondents. The appellants are concluded by the judgment of the Court of Appeal on the appeal from the Court of Revision. That decision was final. The appellants might have asked for leave to appeal to the Privy Council, but such leave would have been refused: *Theberge v. Laundry*, 2 A.C. 102; *Cushing v. Dupuy*, 5 A.C. 409. The question before the Court of Revision was whether the cars were realty or personalty. The Court had jurisdiction to determine this question, and its decision is final: *Niagara Falls Bridge Company v. Gardner*, 29 U.C.R. 194; *London Insurance Co. v. London*, 15 A.R. 629, 634; *Confederation Life Assurance Co. v. Toronto*, 22 A.R. 166. If the assessment deals with a company liable to be assessed and it has property liable to be assessed, the jurisdiction attaches. The appellants having taken the opinion of the Courts and obtained a decision which was final, cannot now bring an action in the same Courts and come here without leave.

Otherwise the declaration of finality is simply waste paper. The cars are fixtures of the power house, and the rails, engines and rolling stock of railways are fixtures: *Redfield on Railways*, vol. 2, p. 546; *Farmers' L. & T. Co. v. Henderson*, 25 Barb. 494. In *Lushington v. Seward*, 1 Sim. 480, cattle and slaves on a plantation were declared to be real estate. The appellants have acquiesced in the decisions of the Court of Appeal and therefore cannot succeed by the device of bringing a subsequent action; *Jones v. City of St. John*, 31 S.C.R. 320. Sec. 85 of the Assessment Act, giving power to the Lieutenant-Governor to submit a stated case, shows that the jurisdiction of the Court of Revision is not limited, as contended by the appellants. The legislature certainly did not constitute the Board of County Judges with an appeal from them to the Court of Appeal for the purpose merely of valuing property.

Bicknell, K.C., in reply.

The judgment of their Lordships was delivered by

LORD DAVEY :—The principal question on this appeal is whether the cars used by the appellants on their system of electric tramways in the City of Toronto and adjoining municipalities are liable to be taxed as real estate. There is another question, whether the matter is *res judicata* between the parties.

The cars are the ordinary electric cars used on electric railways and receive their motive power from an electric current passing through an overhead trolley wire. The power is transmitted to the motors below the trucks by means of a wheel at the end of a trolley pole on the top of the car body, which wheel is pressed up against the trolley wire by a spring. No part of the car is of course fixed in any sense either to the tram rails below or the trolley wires above.

The Assessment Act which was in force in the Province of Ontario was c. 224 of the Revised Statutes of Ontario, 1897. By s. 39 (2) of that Act the personal property of the appellant company is exempt from assessment. And by s. 2 (9) of the same Act "land," "real property," and "real estate" respectively include all buildings or other things erected upon or affixed to the land and all machinery or other things so fixed to any building as to form in law part of the realty.

By the assessment made in 1901 for 1902 the real property of the appellants consisting of rails, poles, tires, wires, cars, and other plant and material being part of its railway system in and upon the streets, roads, and other public places and elsewhere in the City of Toronto was assessed at \$1,247,281. It is admitted that the cars in question are included in this assessment.

The council of the respondents in June, 1902, taxed the appellants the sum of \$8,775 in respect of the agreed value of the cars.

The appellants refused to pay this tax, and commenced the present action in which they claimed a declaration that the cars were personal estate, and that the plaintiffs were not liable for the above sum of \$8,775,

and an injunction to restrain the respondents from taking any proceedings for the collection of the said taxes. The respondents pleaded that in 1901 the street cars were legally assessable as real estate and also relied on a decision of the Court of Appeal dated the 28th of June, 1902, as *res judicata* between the parties.

The action was dismissed by Mr. Justice Ferguson, and an appeal from his judgment was also dismissed by the Court of Appeal on the 15th May, 1903. The present appeal is from the order then made.

No reasons were given either by Mr. Justice Ferguson or the Court of Appeal, as it was admitted that the point of law as to the assessability of the cars as real estate was indistinguishable from the point decided by the Court of Appeal in the previous year. That decision appears to have been given on the authority of a case of *The Bank of Montreal v. Kirkpatrick* decided by the same Court of Appeal in 1901, and reported 2 O.L.R. 113.

That was the trial of an interpleader issue between execution creditors of an electric street railway company and trustees for debenture holders of the same company. The property purporting to be charged by the debentures in question included the rolling stock of the company but the debenture deed was not duly registered as a chattel mortgage. The learned trial Judge held that the rolling stock was an essential part of the railway, the latter being useless for any purpose without it, and therefore that it was real property covered as such by the mortgage. The Court of Appeal affirmed this judgment. Osler, J., who delivered the judgment of the Court, held that the rolling stock of the electric railway really constituted part of one great machine confined to a particular locality for which it was specially constructed and fitted. Detached from the rails (he said) it was incapable of use, and upon the principles laid down in certain well known cases on the law of fixtures he was of opinion that, as regards its liability to be taken in execution, it may properly be regarded as part of the corpus of the entire machine, and therefore in the nature of a fixture and passing with the land over which it ran.

In their case on this appeal, the respondents submit that "the cars" are so actually or constructively affixed to land or buildings as to render "them real property and assessable as such," and this was the point argued before their Lordships. *Kirkpatrick's case* is not a direct authority in this case, which depends on the construction to be put on the Assessment Act, but the court below evidently considered that the reasons given for the judgment in *Kirkpatrick's case* were equally applicable to the present one.

Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, or adopt the reasoning of Mr. Justice Osler in *Kirkpatrick's case* without doing violence to the English language and to elementary principles of English law. It does not appear to them to advance

the argument to describe the appellants' system of electric traction as a great machine, or by any other metaphorical expression. The subject of assessment is not the appellants' system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, and are not fixed in any sense whatever to anything which is real estate. Their Lordships cannot attach any legal meaning to the expressions "in the nature of fixtures," or "constructively affixed," except as an admission that the articles in question are not in fact fixtures or actually affixed. They are, therefore, of opinion that the cars remain and are personal estate only and are unassessable.

The decision of the Court of Appeal, which is said to be *res judicata*, arose out of a proceeding under the sections in the Assessment Act relating to the Court of Revision. By section 62 a Revision Court of three persons is constituted, the jurisdiction of which is defined by section 68, as follows:—

"At the time or times appointed, the Court shall meet and try all "complaints in regard to persons wrongfully placed upon or omitted from "the roll, or assessed at too high or too low a sum." By sections 75 and 84, there is an appeal from the Court of Revision to the County Court Judge, or where a person has been assessed to an amount aggregating \$20,000, to a Board consisting of the Judges of the counties which constitute the County Court district, and from that Board to the Court of Appeal. The Act provides that the appeal shall be heard by three or more Judges of the Court of Appeal, and the decision of such Judges, or a majority of them, shall be final.

The appellants appealed to the Court of Revision against the assessment of 1901 on the ground amongst others that the property enumerated was not liable to assessment as real property. The Court of Revision dismissed the Appeal and their decision was affirmed by the County Court Judges and subsequently by the Court of Appeal.

It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those courts had no jurisdiction to determine the question whether the Assessment Commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of the 28th June, 1902, was not, therefore, the decision of a court having competent jurisdiction to decide the question in issue in this action and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal in the present case as that court only followed its own decision in the appeal from the Revision Court in the previous year. It is, therefore, a satisfaction to their

Lordships to know their decision is in accordance with the opinions expressed by learned Judges in the Court of Appeal for Ontario and in the Supreme Court in other cases. In *Nickle v. Douglas*, 37 U.C. Q.B. 51, the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian courts, that that court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co. v. City of London*, 15 Ont. Ap. Rep. 629, the decision of the County Court Judge was treated as final, because the question was within the jurisdiction of the assessor, but Hagarty, C. J., held that if the property had not been assessable, that would have shown that ab initio the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction and their confirmation of the Assessors' Act would go for nothing, and Pater-son, J., expressed himself to the same effect. In the *City of London v. Watt & Sons*, 22 S. C. R. 300, the Chief Justice said: "I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act does not make the roll as finally passed by the Court of Revision conclusive as regards questions of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void ab initio and confirmation by the Court of Revision cannot validate it."

Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal for Ontario of the 15th May, 1903, should be reversed, and instead thereof a declaration should be made and an injunction granted as claimed by the statement of claim, and the respondents should pay the costs in both courts. The respondents will also pay the costs of this appeal.

Book Reviews.

Street Railroad Accident Law. By ANDREW J. NELLIS, of the Albany, N.Y. Bar. Albany, N.Y.: Matthew Bender, law publisher, 1904. 850 pages, \$6.00.

Mr. Nellis has made this branch of the law his own, being already favourably known to the profession by his recent work on the kindred subject of street surface railroads.

This book claims to be a complete treatise on the principles and rules of law applied by the courts of the United States and Canada in determining the liability of street railroads for injuries to the person and property by accident to passengers, employees and travellers on the public streets and highways.

It must be a comfort to any writer to take up a subject which is new and largely self-contained. That may be said to be the case here. The author commences by a general definition of street railroads, and shews how the litigation connected with them necessarily differs from that which concerns general traffic railroads especially in that the right of the former in streets is subordinate to the right of the public therein, and subject to the regulations of the municipal authorities; the author dealing with matters wherein street railroads differ from railway transportation companies, the former being limited in their use to the carriage of passengers.

The work before us is to be commended more for its intelligent grouping of authorities, under appropriate heads, than for the discussion of difficult points; but the result is a useful summary of the cases bearing on a subject of growing importance. We could have wished that the Canadian cases had been more largely referred to. If legal authors in England and the United States paid more attention to this matter their books would find much larger sale in this country than they do.

The Laws of Insurance. By JAMES BIGGS PORTER, Barrister-at-Law of Inner Temple. Fourth edition. London: Stevens and Haynes, law publishers, 8 Temple Bar, 1904.

In his first edition, published in 1884, the author undertook to treat in one volume of Life, Fire, Accident, and Guarantee Insurance. There apparently was good reason for thus grouping these together as we have now the fourth edition of the work before us. It embodies cases of the English, Scotch, Irish, American and Canadian Courts. The selection of authorities is necessarily limited, but Mr. Porter having made a careful and discriminating selection, the reader can have no cause for quarrel with him. The concise way in which the law is laid down and the intelligent arrangement of the subjects are features of this excellent book which have commended it to the profession.

Mason on Highways. Containing the New York Highway Law. 3rd edition. By H. B. MASON, of the New York City Bar. Banks & Co., Albany, N.Y., 1904.

This book is peculiarly applicable to the State of New York, giving constitutional and statutory provisions relating to highways with the good roads laws and motor vehicle law with annotations and forms. As we in this country are beginning to pay more attention to good roads, and as that objectionable and unsightly vehicle known as the automobile has come to stay, those concerned will find some useful suggestions in Mr. Mason's book.

UNITED STATES DECISIONS.

DISCOVERY.—The power of courts, at common law, to order an examination of the person of one alleged to have been injured by the negligence of another, for the purpose of ascertaining the extent of the injuries, is denied in *Austin & N. W. R. Co. v. Cluck* (Tex.) 64 L.R.A. 494.

MENTAL SUFFERING.—Mental anguish and suffering are held, in *Cowan v. Western U. Teleg. Co.* (Iowa) 64 L.R.A. 545, to be sufficient to sustain an action for breach of contract promptly to transmit and deliver a telegram.

HIGHWAYS.—The right of a bicyclist to hold a town liable for injuries caused by a defect making a highway unsuitable for ordinary travel is sustained in *Hendry v. North Hampton* (N.H.) 64 L. R. A. 70, under a statute making towns liable for injuries to any person travelling upon a dangerous embankment upon a highway by reason of any defect or want of repair of such embankment, or defective railings, which renders it unsuitable for travel thereon.

One who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is held, in *Busse v. Rogers* (Wis.) 64 L. R. A. 183, to be liable for injuries caused by its fall upon a child who, while travelling along the street follows its inclination to play, and attempts to climb upon the pile, and thereby causes the lumber to fall.

NEGLIGENCE.—A property owner is held, in *Hoff v. Shockley* (Iowa) 64 L.R.A. 538, not to be liable for injuries to a traveller caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property.

A corporation is held, in *Saylor v. Parsons* (Iowa) 64 L. R. A. 542, not to be liable for injuries to its employee in attempting to rescue one of its members who, in superintending and working with the employee, undermines a wall so that it is about to fall upon him, when the employee springs forward from a place of safety to avert the impending accident.

The right of a master to delegate to a servant the duty of inspecting long ladders furnished for the use of employees, and replacing rotten rounds, so as to escape liability for injuries caused by neglect of the duty on the ground that the negligence was that of a fellow servant of one injured by a fall caused by the breaking of a rotten round, is denied, in *Twombly v. Consolidated Electric Light Co.* (Me.) 64 L.R.A. 551.

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We doubt whether Professor James Bryce's proposal to aid the cleansing of the Augean stable of politics in the New World by having every public officer or member of an administration "excluded absolutely and entirely from participation in the ballot" and from the right "to speak or write on any political subject" is at all likely to be adopted by the free communities of America. To deny the franchise and the right of free speech on any subject that strikes at the heart of patriotism to cabinet ministers and civil servants, while these "birth-rights of British freemen" are open to the abuse of every small partisan trickster and bar-room loafer is a bit of radical despotism too silly to be debated. Better begin by disfranchising those who could not obtain a certificate of good citizenship from the courts, say we; and rigidly enforce the provisions of the present election law as to those guilty of corrupt practices.

In connection with matters affecting Bench and Bar we have from time to time referred to the system of appointing judges in vogue in the United States, apart from the Supreme Court Bench. We have ventured to express a doubt whether our system after all, as carried out in recent years, produces the best result. An article in one of our exchanges in the State of New York shews a very satisfactory condition of things in this regard, and that the Superior Court judges of that State are quite as free from political influence as we can claim for those in this Dominion. The time for boasting of our system as compared with the elective system as worked out in the State of New York seems to be at an end. We commend the last sentence of the article referred to, to the consideration of those who, of whatever political party, have the grave responsibility of making judicial appointment. It would seem rather a shameful thing for us that the electors of a democratic country should show more sense of responsibility in such an important matter than the Ministers of the Crown in a comparatively conservative community.

The article above referred to reads as follows: "The nomination by both the Republican and Democratic conventions in New York State of two judges for the Court of Appeals who have already been in service on that bench, and one of whom is a Republican and the other a Democrat, gives great satisfaction to the majority of good citizens. Some of the Supreme Court judges have received similarly unanimous renominations. It is highly encouraging to those who believe in separating the judiciary as far from partisan influences as possible. It is also a strong proof of the fitness of the voters to be entrusted with the privilege of electing their own judges. Several severe lessons have been taught the politicians by the voters of New York State when political influences have been too prominent in the selection of candidates for the bench. There are, nevertheless, some in both parties in whom the theory that offices are meant for political rewards is so ingrained that they deprecate the action taken by the conventions of the great parties this year, and there were plenty of men in the conventions who were very reluctant to nominate on their ticket a candidate who belonged to the other party. Nevertheless, good sense and political wisdom combined in overruling those ultra-partisans. The history of judicial elections in New York State has now pretty fully demonstrated that the judges of the higher courts, at least, if they have performed satisfactory service, will be re-elected, making practically a life tenure after the first election until they reach the age limit. Furthermore, frequent rebukes of the politicians when they have made a nomination which the voters thought to be only a reward for political services, and not based on any special fitness for the place, have made it clear that the people are fairly well able to protect the bench from being the gift of the political bosses. It would be too much to say that political influences are of no weight in the selection of judges, but it is not too much to say that the voters have compelled them to be kept well within bounds, and that there is an increasing evidence that they will not tolerate the use of the judicial office as a mere gift of spoils."

THE PRIVY COUNCIL AND CANADIAN JUDGES.

If there is one thing more than another that has taught those who dwell in the "British dominions beyond the Seas" respect for the Bench of the mother-land it is the dignified courtesy of its occupants both in demeanor and speech. Rare lapses from the splendid traditions of judicial behavior in England have indeed been known to us—such as, for instance, when Lord Westbury proclaimed his malevolent delight in reversing his great rival and predecessor Campbell's decisions, asserting that all that was required to enable one to do so was the knowledge of a "few elementary rules of law." But such instances of what the French call *grossièreté* have happily been few, and pale their insignificant fires in the brighter atmosphere of refinement which envelops the history of the judiciary as a whole. Unfortunately, however, in the halls of justice, as well as in other public spheres, the civilization of modern England, cultured as it is, ever and anon discloses some faint "intimations of the savage," which serve to remind us that man's progress toward the ideal of conduct is a slow and arduous one. Eternal vigilance may be said to be the price of good manners as well as of liberty.

The above reflections were engendered by reading the report of the judgment of the Judicial Committee of the Privy Council in *Toronto Railway Co. v. City of Toronto*, ante p. 753. This judgment purports to have been written by Lord Justice Davey, and contains the following extraordinary criticism upon one whose reputation as a judge is second to none among the personnel of the Canadian Bench at the present time:—

"Their Lordships are always disposed to treat with great respect an unanimous decision of the Court of Appeal in Ontario on the construction of one of their own statutes, but they cannot accede to the argument addressed to them, *or adopt the reasoning of Mr. Justice Osler in Kirkpatrick's case without doing violence to the English language, and to elementary principles of English law.*"

We leave it to the dispassionate consideration of our readers to say if the above expressions as italicized by us would redound to

the credit of any judge in speaking of the opinion of another judge, be the latter never so incapable, or his court never so inferior. But to put it mildly, it shocks our sense of right that the subject of these strictures should be such a man as Mr. Justice Osler, whom learning and painstaking research in connection with cases coming before him is only equalled by his courtesy and consideration for others. There are those who might well follow his distinguished example in these respects.

Let us explain that it is not to our purpose to endeavour to impugn the conclusion arrived at by their lordships of the Privy Council in the *Toronto Railway Company's* case. We sufficiently apprehend the futility of enterprises of this sort to withhold our hand from them whether their lordships are right or wrong in their decisions; but we feel it incumbent on us as an organ of the legal profession in this country to denounce and displace the imputation so gratuitously placed upon the capacity of a Canadian judge, as well as the court for which he spoke, in delivering judgment in the *Kirkpatrick* case.

Now what is this matter in which Mr. Justice Osler has "done violence to the English language and the elementary principles of English law"? It is a matter touching the legal interpretation of the word "fixtures." Such being the case, it does not need the skill of a philologist to show that Lord Davey's talk about violence being done to our mother-tongue is baseless to the verge of maliciousness. No one ought to be better aware than Lord Davey himself, an Oxford "double-first" as he is, that the literal meaning of the word "fixture" is not only not its legal meaning, but that the legal meaning is sometimes the very antithesis of its common and literal meaning. When Judge Osler refers to "fixtures" in the *Kirkpatrick* case, he treats it as a term in legal technics—and what is more, Lord Davey knows that he does. How specious, then, to raise any question of etymological exactness!

So much for the "English language" element in Lord Davey's strictures. Now let us see how far Judge Osler has offended "elementary principles of English law." The case in which Osler,

J., acted as the mouth-piece of the Ontario Court of Appeal in deciding that the term "fixtures" would include the cars or rolling stock of an electric street railway, arose upon an interpleader issue between certain execution creditors, who were defendants in the foreclosure case of *Kirkpatrick v. Cornwall Electric Street Railway Co.*, and certain trustees and debenture holders, who were plaintiffs in that case (see 2 O.L.R. 113 and 119). On the interpleader issue the chief question was whether the railway company's rolling stock was liable to seizure under execution, or was protected by a mortgage made by the company of its real estate, together with all "buildings, machinery, appliances, works, and fixtures, etc., and also all rolling stock, and all other machinery, appliances, works, and fixtures, etc." to be thereafter used in connection with the railway. For the execution creditors it was contended that the rolling stock was personal property, and did not pass with the railway to the mortgagees under the mortgage. The trial judge, (Armour, C.J.) decided the interpleader issue in favour of the mortgagees, and the Court of Appeal affirmed this judgment, holding (per Osler, J.) that the rolling stock of an electric railway constitutes a "part of a great machine confined to a particular locality, for which it is specially constructed and fitted, being operated by means of a continuous current of electricity generated in part of the fixed plant in the power house, and passing through the trolley pole of the car, which is fitted to the overhead wire, through the car to the unbroken line of rails and back to the generator." Hence, "detached from the rails the rolling stock is incapable of use; and upon the principles laid down in *Place v. Fagg*, 4 M. & Ry. 277; *Fisher v. Dixon*, 12 Cl. & F. 312, and *Mather v. Fraser*, 2 K. & J. 536, such rolling stock "is to be regarded in the nature of a fixture, passing with the land over which it runs." Thus we find that instead of dealing with an "elementary" (i.e. primary, simple) principle Mr. Justice Osler is here dealing with one of the most complex and uncertain subjects that confront us in English law. In *Sheen v. Rickie*, 5 M. & W. at p. 182, so great a judge as Baron Parke professes his inability to put any nice limitation upon the meaning of the word "fixtures"

in law. He regards it as a "very modern word," with its bearings still in a welter of ambiguities. Again, so far has the word departed from its "elementary" meaning that Brown on Fixtures (4th ed. p. 2) says: "The term, 'fixtures' originally connoted in every instance of its use that sort of positive fixation and positive annexation which the etymology of it suggests; and it now connotes in the general instance no such idea at all; but on the contrary the very opposite idea, namely, the right of the tenant to unfix and remove." Another able writer (6 Am. Law Rev. p. 412) has said: "The student who seeks to determine a question relating to 'fixtures' has before him a task by no means easy. He finds at once that the primary definitions are not merely vague but conflicting; and, proceeding further, he meets a variety of ingenious theories and distinctions quite out of harmony with each other, and complex in the extreme; and finally, in his last resort, the reports, he encounters a mass of heterogeneous cases." Setting aside the "wavering definitions," as he styles them, Brown, in the work quoted, would venture "to define the term in the following neutral manner, that is to say, things associated with, and more or less incidental to the occupation of lands and houses or either thereof."

Accepting as authoritative these expositions of the vagueness and ambiguity surrounding the subject of "fixtures", we think that Lord Davey was just as unhappy in his criticism of Judge Osler's knowledge of "the 'elementary' principles of English law" as he has been shown to be in his flier at the esteemed Canadian judge's acquaintance with the use of his native language. Furthermore, we hazard the opinion that the professional mind will find in Judge Osler's application of the doctrine of "fixtures" in the *Kirkpatrick* case more harmony with the definition stated by Brown, and quoted by us above, than it will in Lord Davey's view that "the cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, *and are not fixed in any sense whatever to anything which is real estate.*" We submit, with deference, that any one acquainted with the system of electric trolley traction as it obtains

in this country, would "do violence to the English language" if he maintained that a trolley car in use was "not fixed in any sense whatever" to the rails and wires and power house; and 'fixed' to an infinitely greater degree than fish in an artificial pond, manure upon land, seaweed cast upon the shore, the key to a lock (which may be carried in one's pocket), and a number of other extraordinary things which the courts of England and America have held to be "fixtures." All cases of this class have been decided not upon the theory of actual fixation or annexation to the land, but upon that of permanent accessory use therewith. In *Fisher v. Dixon*, 12 Cl. & F. at p. 330, Lord Cottenham says: "If the corpus of the machinery is to be held to belong to the heir, it is hardly necessary to say that we must hold that all that belongs to that machinery, although more or less capable of being used in a detached state from it, follows the same principle and remains attached to the freehold."

Lord Cottenham's observations are precisely in line with Judge Osler's view, and, as will be seen, *Fisher v. Dixon* is relied on by the latter in the *Kirkpatrick* case. It is also to be observed that the *Kirkpatrick* case was decided along the same lines as those upon which the judgment of the Supreme Court of the United States proceeded in *Pennock v. Coe*, 23 How. 117, where the mortgagees of a railroad were held entitled to the rolling stock as against execution creditors, the mortgage there in question purporting to convey the road "together with the rolling stock, and all other personal property, etc." So in the case of *Farmer's Loan and Trust Co. v. Hendrickson*, 25 Barb. 484, where as between mortgagees and judgment creditors of the mortgagors, all kinds of rolling stock of the railroad company, such as engines, passenger and freight cars, hand-cars, snow-plows, etc., were held to be fixtures. In the course of his very able opinion (adopted by the Court) in the latter case, Strong, J., says: "That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can of course be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else. They are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose . . . The railway is constructed expressly for the business to

be done by the cars ; . . . it is nothing without its locomotive vehicles." Very much the same reasoning led Drummond, J., in the Quebec case of *Grand Trunk Ry. Co. v. Eastern Townships Bank*, 10 L.C.J., at p. 15, to hold a locomotive engine an "immovable by destination." See also *Ontario Car Co. v. Farwell*, 18 S.C.R. 20.

Now these arguments apply with greater force to electric trolley roads ; for inasmuch as trolley cars are not independent of the tracks and permanent structures of the railroad, in respect to their motive power, like a train of steam-cars, they are obviously more in the nature of "fixtures" in the primary and literal sense.

We think we have laboured the points at variance between Lord Davey and Mr. Justice Osler sufficiently to show that the latter was guilty of doing violence neither to the English language nor to the elementary principles of English law in his judgment in the *Kirkpatrick* case. We think also that upon our review of the law and the facts, it is pretty well established that Lord Davey's objectionable language in the *Toronto Railway Company's* case was simply a bit of petulant hypercriticism. But we do not imagine that it is going to stimulate in any way the aversion to maintaining the system of appeals from this country to the Privy Council, of which we hear something now and again in the press and Parliament. The tone of the Bench and Bar in Canada is above any vindictive or prolonged resentment of a slight such as this. Circumstances may prompt us to forgive it, if we cannot wholly forget it. We recognize Lord Justice Davey as a good and able judge ; but we also recognize that "quandoque bonus dormitat Homerus," and that it is now possible for the lowered standard of judicial behaviour in the Privy Council to suffer in comparison with that of a Canadian Court.

**INJURIES OCCASIONED BY OR THROUGH THE ACTS
OF THIRD PERSONS.**

It seems repugnant to one's notion of abstract justice to find that many injuries to which other people have directly or indirectly contributed by carelessness or greed should come under the classification of injuries incapable of legal redress. This objection has been felt in courts of law, and attempts have been made to enlarge the borders of redressible injuries, but these efforts have been more or less hampered, on the one hand by the difficulty of finding any satisfactory legal principle on which to base relief, and on the other, by a dread of opening the door of justice too widely. One of this class of cases was the well-known case of *Heaven v. Pender*, 11 Q.B.D. 503. In that case the plaintiff's master was employed to paint a ship then lying in the defendant's dock, the defendant having contracted with the ship's owner to provide the necessary staging to be strung on the side of the vessel to enable the painting to be done. This staging proved to be insecure, and gave way, whereby the plaintiff was injured. His master, apparently, was not liable, because he was in no way responsible for the efficiency of the staging unless therefore the man who negligently erected the staging was liable—the injured workman was without redress and his misfortune would be *damnum absque injuria*. He accordingly sued the dock-owner and at the trial judgment was given in favour of the plaintiff, but this was subsequently set aside on appeal by the Divisional Court (Field and Cave, JJ.), 9 Q.B.D. 302. Field, J., said: "In order to support an action, the plaintiff must shew either the existence of a contract between himself and the defendant, or that some relation existed between them which created a duty from the defendant to the plaintiff to use due and reasonable care, and that the defendant was guilty of a breach of that duty," and this was considered generally up to that time to be a correct statement of the law governing the case. Here there was no contract between the plaintiff and defendant, and the Divisional Court held there was no duty owing from the defendant to the plaintiff. The Court of Appeal (Brett, M.R., and Cotton and Bowen, L.JJ.) reversed this decision, and made a distinctly new departure, but they differed in their reasons. Brett, M.R., laid down as the guiding principle that "wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary

sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger;" but to this rule the other members of the Court declined to assent, and they based their decision on the ground that the defendant had, in contemplation of law, invited the plaintiff to use the staging and, therefore, owed a duty to him to see that it was safe. This theory of "an invitation," is, of course, a pure creation of the legal imagination, and seems a less satisfactory ground for the decision than the broader principle proposed by Brett, M.R., and yet it must be confessed that such a principle, if established, would widen the circle of a man's liability for injuries occasioned by his negligence very considerably, if not indefinitely. Not long ago many people in England were suffering from arsenical poisoning, which it was discovered was occasioned by the beer they were drinking. In the manufacture of the beer brewing sugar, in which sulphuric acid is an ingredient, had been used. The makers of this sugar contracted with the firm which supplied the acid that it should be free from arsenic, but they, in breach of their contract, delivered acid containing arsenic with the result that many persons suffered serious injury through their carelessness—according to the chain of liability recognized by the law, the customers could sue the retail dealer: *Wren v Holt* (1903) 1 K.B. 610 (ante vol. 39, p. 438), and the retail dealer could sue the brewer; the brewer could sue the vendors of the brewing sugar; and the manufacturer of the brewing sugar could sue the manufacturers of the acid: *Bostock v. Nicholson* (1904) 1 K.B. 725 (ante p. 453); but the consumers had apparently no right of action against the makers of the acid who were the real cause of their injury. Abstract justice would seem to require that in such a case the manufacturer of the deleterious article should be liable in damages to all who should suffer injury as the result of his carelessness. The damages of those who ultimately suffer under such circumstances, however, is in the eye of the law "too remote" from the original cause of the injury.

Possibly if it could have been shewn that the manufacturers of the acid knew that it was to be used in making beer they would have been directly liable to the persons injured by drinking the beer.

There is, however, a class of cases in which it has been held that third persons injured by goods purchased by another are

entitled to recover damages from the vendor for injuries caused by such goods. Thus there is the well-known case of the gun bought by a father for the use of his son, which the vendor represented to be sound, and made by a well-known gun maker, but which proved to be unsound, and not made as represented, and which exploded injuring the son, and the son was held entitled to sue the vendor for damages: *Langridge v. Levy*, 2 M. & W. 519, affirmed in the Exchequer Chamber 4 M. & W. 337. In giving the judgment of the Court of Exchequer in that case Parke, B., said: "We therefore think that as there is fraud, and damages, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted on, the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequence of his fraud whilst the instrument was in the possession of a person to whom his representation either directly or indirectly communicated, and for whose use he knew it was purchased." That case, therefore, rests on the ground of the fraudulent representation at the time of sale which the defendant knew would be acted on by a person for whose use the gun was bought.

In *George v. Skivington*, L.R. 5 Ex. 1, the plaintiff purchased from the defendant a hair wash for the use of his wife, which had been prepared by the defendant. The vendor represented that the article was fit and proper to be used as a hair wash. In consequence of the unskilful making up of the article damage was done thereby to the plaintiff's wife. The husband and wife sued. It was argued that the action was that of the wife only, and that as there was no privity of contract between her and the defendant, he was not liable to her; but the Court of Exchequer (Kelly, C.B. and Pigott and Cleasby, B.B.) held that the defendant had been guilty of negligence in preparing the wash which he knew was to be used by the female plaintiff, and was liable to her in damages.

In *Priest v. Last* (1903) 2 K.B. 148 (noted ante vol. 39, p. 615), the plaintiff purchased a hot water bottle which proved defective, and his wife was, in consequence scalded, and the plaintiff sued for

the expense he had been put to in consequence, and was held entitled to recover, but there was privity of contract between the plaintiff and defendant, and the only question was whether there was an implied warranty of fitness; but according to *George v. Skivington* the wife herself would also have had a cause of action. The cases of *Heaven v. Pender*, *Langridge v. Levy* and *George v. Skivington* have been relied on as establishing the principal enunciated by Brett, M.R., but without success, and the Courts have shewn an intention of restricting rather than extending the principle of those cases. Thus in *Caledonia Railway Company v. Mulholland* (1898) A.C. 216, the plaintiff's husband was a servant of the Glasgow Railway, and was killed owing to a defective brake on a waggon belonging to the Caledonian Railway, which had been lent by that company to the Glasgow Railway. The plaintiff sued the Caledonian Railway, and *Heaven v. Pender* was relied on, but the House of Lords held that the plaintiff was not entitled to succeed because the Caledonian Railway owed her husband no duty: and so far as regards misrepresentation, acted on by third parties they have definitely held that unless such misrepresentation can be shewn to have been made fraudulently and with an evil mind the third party has no right of action: *Peek v. Derry*, 14 App.Cas. 337; *Le Liever v. Gould* (1893) 1 Q.B. 491; *Low v. Bouverie* (1891) 3 Ch. 82. The cases on this subject up to the year 1900 have already been very fully discussed in this journal by Mr. Labatt (see vol. 36, p. 178), and it would be useless to reiterate what was there said. The matter is one, however, of perennial interest, and is again brought to our attention by the very recent case of *Earl v. Lubbock*, 91 L.T. 73. In that case the defendant was under contract with Beaufoy & Co. to keep in good and substantial repair certain vans. One of the vans was repaired by defendant, but owing to the negligence of one of his workmen, it was not efficiently repaired, and one of the wheels came off and the plaintiff, a servant of Beaufoy & Co., who was driving the van at the time, was injured. If negligence constituted a good ground of action, as was held in *George v. Skivington*, supra, then one would think the plaintiff had a good case, but the very point in question had in fact been determined adversely to the plaintiff in *Winterbottom v. Wright*, 10 M. & W. 109; there the Postmaster-General had made a contract with the defendant to repair certain mail coaches; in making repairs to one of the coaches he was guilty of

negligence, and in consequence the plaintiff, who was driving the coach, was injured, and the plaintiff was held to have no right of action against the defendant. That case the Divisional Court (Lord Alverstone, C.J., Wills and Kennedy, JJ.) in *Earl v. Lubbock*, considered to be good law, and dismissed the action. At the same time it is deserving of notice that *Winterbottom v. Wright*, as Kennedy, J., points out, was decided on a demurrer to a declaration which did not allege that the defendant knew that the plaintiff or other persons of the same class would necessarily or probably drive the van in question. How far the omission of this allegation of fact, influenced the decision, it is difficult to say.

The difficulty in threading one's way through this branch of law is increased by the conflict of judicial opinions, and the impossibility of ascertaining with precision the precise rule which governs any given case; for example, negligence in preparing an article bought, to the knowledge of the vendor, for the use of a third person who is injured thereby, will give the third person a right of action against the vendor though there be no privity of contract between them: *George v. Skivington*, supra; and negligence in constructing a staging intended to be used by a third person will give the third person a right of action for injury sustained in consequence of such negligence against the person guilty thereof: *Heaven v. Pender*, supra; but negligence in repairing a vehicle intended to be used by third persons will give such third person no right of action for injuries sustained in consequence of such negligence: *Winterbottom v. Wright* and *Earl v. Lubbock*, supra; and mere negligence (without actual fraud), in making a statement which a third person acts upon will give no right of action to such third person making the statement: *Peek v. Derry*, and other cases, supra; *Low v. Bouverie* (1891) 3 Ch. 82; *Dominion S. & J. Co. v. Kittridge*, 23 Gr. 631; *Moffatt v. Bank of U. C.*, 5 Gr. 374; *Cook v. R. C. Bk.* 20 Gr. 1. These appear to be self-contradictory propositions and yet all are good law according to the present state of the authorities.

G. S. HOLMESTED.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

 (Registered in accordance with the Copyright Act.)

SHIP—CHARTER PARTY—DETENTION BY ICE—CESSATION OF HIRE.

In re Traae v. Lennard (1904) 2 K.B. 377, brought up the construction of a charter party which provided that there should be a cessation of the hire in case of detention by ice "unless caused by the breakdown of the steamer." In the course of her voyage the ship was stranded and had to be repaired, when she resumed her journey she was unable to reach her port owing to ice. This would have been avoided but for the delay occasioned by the stranding and subsequent repairs. Ridley, J., held that this was a detention "caused by the breakdown of the steamer" and therefore there was no cessation of hire.

WILL—CHANGE OF DOMICIL OF TESTATOR—WILLS ACT, 1861 (24 & 25 VICT. C. 114) S. 3—(2 ED. 7, C. 18, 3, 4 (O.).)

In re Groos (1904) P. 269, a testatrix, a foreigner, residing in Holland in November, 1868, made her will. She subsequently married and came to reside in England, where she acquired an English domicil. According to Dutch law, the marriage did not revoke the will. The question was raised whether the will was revoked by change of domicil, and it was contended that the Wills Act, 1861, s. 3 (2 Edw. 7 c. 18, s. 4, O.) only applied to wills of British subjects. Barnes, J., however, held that the section applied to all wills, but as the will, in accordance with the Dutch law, limited the executorship to one year, the probate was also so limited.

SHIP—BILL OF LADING—NEGLIGENCE OF CARRIER'S SERVANTS—LIMITATION OF LIABILITY OF CARRIER.

The Pearlmoor (1904) P. 286, may here be briefly referred to as affirming the rule laid down in *Price v. Union Lighterage Co.* (1904) 1 K.B. 412 (noted ante p. 262), that a shipowner who seeks to exempt himself from liability for the negligence of his servants must do so by express words.

**COMPANY—WINDING UP—PRACTICE—LIQUIDATOR TAKING PROCEEDINGS—
SECURITY FOR COSTS.**

In re Strand Wood Co. (1904) 2 Ch. 1, a liquidator had instituted proceedings against certain officers of a company in liquidation for an alleged misfeasance, and they applied to compel the liquidator to give security for costs on the ground of his poverty; but the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.) affirmed the order of the Registrar dismissing the application, holding that the practice did not warrant the granting of the motion.

**TENANT FOR LIFE—REMAINDERMAN—CAPITAL—INCOME—WASTING SECURITIES
RETAINED—RATE OF INTEREST—INCOME OF INVESTED SURPLUS.**

In re Woods, Gabellini v. Woods (1904) 2 Ch. 4. certain mining royalties, forming part of a testator's residuary estate, which were subject to a trust for conversion, were retained by the trustees pursuant to a power in that behalf, and it became necessary to determine the rights therein of the tenant for life and remainderman, and Kekewich, J., decided that the value of the royalties must be ascertained and interest at 3 per cent. on such value be paid to the tenant for life, that rate being fixed having regard to the rate of interest at present obtainable in England on securities on which trustees may invest, and that the surplus income derived from the securities should be invested as capital, and the interest on that should also be paid to the tenant for life.

**EASEMENT OF NECESSITY—LIGHT—GRANT OF ONE OF TWO ADJOINING
TENEMENTS—DEROGATION FROM GRANT—IMPLIED RESERVATION.**

In Ray v. Hazeldine (1904) 2 Ch. 17, Kekewich, J., decided that where the owner of two adjoining houses grants one of them to another person, there is no implied reservation of a right to light for the house retained by the grantor, as it exists at the time of the grant. In the present case the grantee's successor in title erected a wall which blocked a light to a pantry window in the house retained by the grantor, so as to render the pantry useless as a pantry. The right to light to a window, the learned judge holds, cannot be regarded as implied by or reserved as an "easement of necessity," such easements being only such as are absolutely necessary, without which the property retained cannot be used at all.

PRINCIPAL AND SURETY—CO-SURETIES—INSURANCE OF MORTGAGE DEBT—COVENANT TO PAY WITH LIMIT OF LIABILITY—CONTRIBUTION.

In re Denton, License Insurance Corporation v. Denton (1904) 2 Ch 178, the decision of Eady, J. (1903) 2 Ch. 670 (noted ante p. 103) has failed to meet with the approval of the Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.), that Court being of opinion that upon the true construction of the contract the plaintiffs who had insured the mortgage debt were not co-sureties with Denton, who had also covenanted for its payment in part, but were guarantors to the mortgagees against the default of both the mortgagor and Denton, and as assignees of the mortgage were entitled to recover against Denton on his covenant, and that he was not entitled to deduct from the amount due by him any sum as due by way of contribution by the plaintiffs as co-sureties.

DOMICIL—CHANGE OF DOMICIL—EVIDENCE—ONUS OF PROOF.

Winans v. Attorney-General (1904) A.C. 287, was an appeal from the Court of Appeal's decision that the father of the appellant had changed his domicile of origin and had acquired an English domicile, and, in consequence, that a legacy left by his will was liable to legacy duty. It was clear on the evidence that the deceased's domicile of origin was in the United States, and it appeared that, though he had left the States in 1850 and had never returned, but had lived in England, Scotland and Russia, yet he had never entirely given up his intention of returning to the United States, but, on the contrary, shortly before his death, had expressed his intention of so doing, and described himself in his will as a citizen of the United States of America. The House of Lords (Lord Halsbury, K.C., and Lords Macnaghten and Lindley) came to the conclusion on the evidence that the onus was on those who asserted the change of domicile, and that they had not satisfied it. Lord Lindley, however, dissented, and considered that the proper inference to be drawn from the acts of the testator during the last twenty or twenty-five years of his life was that he had abandoned his domicile of origin, and acquired an English domicile.

WATER—RIPARIAN OWNER—RAILWAY COMPANY—ABSTRACTION OF WATER FOR PURPOSES UNCONNECTED WITH RIPARIAN TENEMENT.

McCartney v. Londonderry & L. S. Ry. (1904) A.C. 301, was an appeal from the Irish Court of Appeal. The defendant railway

crossed a natural stream, the water from which they proposed to divert by a pipe placed in the stream at the crossing, so as to carry the water along their line to a tank, to be there consumed in working their locomotive engines. The appellant, who had also riparian rights in the same stream, which he utilized for the purpose of his mill lower down, took steps to prevent the plaintiffs from so diverting the water, and the plaintiffs claimed to restrain him from interfering with their use of the pipe. The defendant was unable to shew any material damage sustained by him by reason of the pipe, or that, if worked to its full capacity, it would have injured his mill. The Irish Court of Appeal granted the injunction as prayed, but the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) held that the defendant was acting within his rights and dismissed the action, overruling the case of *Sandwich v. Great Northern Ry.* (1878) 10 Ch. D. 707. Their lordships hold that the only use a riparian proprietor is entitled to make of the waters of the stream is for the purpose of his tenement, and that the use which the railway company made of the water in question was not a riparian use at all.

MORTGAGE—CLOG ON EQUITY OF REDEMPTION—OPTION TO MORTGAGEE TO PURCHASE MORTGAGED PROPERTY.

In *Samuel v. Jarrah Timber Co.* (1904) A.C. 323, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Lindley) have affirmed the decision of the Court of Appeal (1903) 2 Ch. 1 (noted ante vol. 39, p. 618), to the effect that a provision in a mortgage deed giving the mortgagee an option to purchase the mortgaged property is a clog on the equity of redemption, and as such invalid. The Lord Chancellor regrets that such should be the state of the law, as the bargain was fair and each party knew what they were doing.

COMPANY—PROSPECTUS—OMISSION FROM PROSPECTUS OF MATERIAL CONTRACT—FRAUDULENT PROSPECTUS—SHAREHOLDER—DIRECTOR—COMPANIES ACT, 1867 (30 & 31 VICT. c. 131), s. 38—(2 EDW. VII., c. 15, s. 34 (D.))—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., c. 64) s. 3, SUB-S. 1—(R.S.O. c. 216, s. 4.).

Shepherd v. Broome (1904) A.C. 342, is the case known as *Broome v. Speak* (1903) 1 Ch. 586 (noted ante vol. 39, p. 443). The point in issue was the liability of a defendant, who was a director of a limited company, for damages sustained by the plain-

tiff as shareholder, owing to his having bought shares on the faith of a prospectus which omitted a material contract. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) affirmed the judgment of the Court of Appeal, holding it to be immaterial that the director was advised and *bonâ fide* believed that the omission was immaterial, because, notwithstanding that fact, the prospectus must "be deemed to be fraudulent within s. 38 of the Companies Act, 1867," (2. Edw. VII., c. 15, s. 34 (D.)), and that the director was liable both under that Act and the Directors' Liability Act, 1890, (R.S.O. c. 216, s. 4).

COMPANY—FLOATING CHARGE.

Illingsworth v. Houldsworth (1904) A.C. 355, is a case known in the court below as *In re Yorkshire Wool Combers' Association* (1903) 2 Ch. 284, which was noted ante vol. 39, p. 704, for the fact that it furnished a judicial definition of what is "a floating charge" on the assets of a company. It is here only necessary to say that that decision has been affirmed by the House of Lords.

INSURANCE — PROPERTY OF ALIEN ENEMY — LOSS BEFORE COMMENCEMENT OF WAR—SEIZURE BY ENEMY'S GOVERNMENT—WARRANTY AGAINST CAPTURE, SEIZURE AND DETENTION.

Robinson Gold Mining Co. v. Alliance Insurance Co. (1904) A.C. 359 was in its previous stages (1901) 2 K.B. 919, and (1902) 2 K.B. 4 & 9, (noted ante vol. 38, p. 149, and vol. 39, p. 25). The House of Lords have now affirmed the decision of the Court of Appeal. The facts were briefly as follows:—Gold, the property of the plaintiffs—a company registered under the laws of the late South African Republic—was insured by the defendants against "arrests, restraints, detainments of all kings, princes and people" during transit from the mines of the United Kingdom, but subject to a warranty "free of capture, seizure, and detention whether before or after declaration of war." In contemplation of hostilities, but before the actual declaration of war, the gold was seized by the government of the republic and appropriated to its uses. Their lordships (Lord Halsbury, L.C., and Lords Macnaghten, James and Lindley) held that this was a "seizure" within the meaning of the warranty, and therefore the insurers were not liable. We may observe, in passing, that the methods of insurers are curious, and while issuing policies appearing to insure against a specified loss a clause of warranty adroitly introduced practi-

cally relieves the insurer from liability for the very loss which the previous part of the policy purports to insure against.

LICENCE TO CUT TIMBER — EFFECT OF LICENCE — TRESPASS ON LICENSEE'S LAND BEFORE LICENCE GRANTED—COM. STAT. NEWFOUNDLAND 2ND SERIES C. 13, s. 51—(R.S.O. c. 32, s. 3 (i.)).

Glenwood Lumber Co. v. Phillips (1904) A.C. 405, although an appeal from the Supreme Court of Newfoundland, may be found of use in Ontario. The action was brought by the plaintiff as the holder of a timber lease or licence from the Government of Newfoundland to recover damages for timber cut upon the lands covered by the licence or lease prior to the grant thereof to the plaintiff, but removed therefrom by the defendant subsequently to the grant. The defendant contended that the licence only conferred on the plaintiff a right to cut and carry away timber, but did not give the licensee any right of occupation or interest in the land itself, or in the timber previously cut, and that he had no right to timber cut prior to the grant of his licence. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir A. Wilson) held that it was immaterial whether the licence were called a lease or licence, that its legal effect was to give the holder an exclusive right of occupation of the land, and under The Newfoundland Act, C.S.N. 3rd Series c. 13, s. 5 (which appears to be in similar terms to R.S.O. c. 32, s. 3), the licensee is empowered to sue for trespasses committed on the lands. At the trial the plaintiff recovered the value of the timber taken by defendant, and \$400 damages and costs, and the judgment was affirmed by the Supreme Court of Newfoundland. On the appeal the principal point argued was, that the logs having been cut before the date of the plaintiff's title, they did not vest in him and were not the plaintiff's property; but their lordships declined to adopt that view, holding that the plaintiff's licence gave him exclusive possession of the lands and of the logs then lying thereon, and it was an invasion of his rights for the defendants, who were mere wrong-doers, to enter and take the logs away, and the appeal was accordingly dismissed.

PRACTICE—SPECIAL LEAVE TO APPEAL—ABSTRACT POINT OF LAW.

In *The King v. Louw* (1904) A.C. 412, the Attorney-General of the Cape of Good Hope applied for leave to appeal in respect of a point of law incidentally discussed in the case. The respon-

dent had been found guilty of an assault. At the time of the assault he was a British subject, but had gone into rebellion and was serving under a commandant of the forces of the Orange Free State. His defence was that he was acting under superior orders. A point of law was reserved at the trial—viz., that the judge had misdirected the jury that the prisoner, being a rebel, such orders constituted no defence at law. The prisoner was convicted, and the Court upheld the conviction; but a majority of the judges expressed the opinion that there had been a misdirection, and the Attorney-General desired to obtain the opinion of the Judicial Committee on that point; but their lordships held that it being in the circumstances a mere abstract question of law it was not the proper subject for an appeal, and they refused the application.

The *Central Law Journal* generally succeeds in having in each issue an excellent collection and review of cases on some subject of general interest. A recent article in that journal deals with the question when and in what cases the owner of animals which are nearly tame may be liable for their mischievous or wrongful acts. It discusses the subjects under the following heads:—General liability; scienter of the owner of animals; who may in legal contemplation be the owner of a vicious animal; defences and contributory negligence; and trespasses of domestic animals. The article concludes with a quotation from one of those breezy utterances peculiar to the Western States in which a learned Judge, doubtless a lover of that animal which more than any other bring grist to the legal mill:—"A man's dog stands by him in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry winds blow, and the snow drives fiercely, if only he can be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of the pauper master as if he were a prince. When all other friends desert, he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens."

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.]

[July 4.

TORONTO GENERAL TRUSTS CORPORATION *v.* ONTARIO RAILWAY CO.
Railways—Bonds—Mortgage—Default in payment—Sale of railway—
Validity—46 Vic. c. 24, s. 14, 15, 16 (D).

A railway incorporated by Provincial Legislation, and which is afterwards declared to be a work for "the general advantage of Canada" can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding.

Judgment of BOYD, C., 6 O. L. R., affirmed.

Aylesworth, K. C., and *Walter Barwick*, K. C., for appellants. *C. Robinson*, K. C., and *Riddell*, K. C., for respondents.

Moss, C. J. O.]

[July 4.

RE NORTH RENFREW PROVINCIAL ELECTION, *WRIGHT v. DUNLOP*.

Provincial election—Presentation of petition—Subsequent denial by two of the petitioners of the statements contained therein—Absence of corroboration—Denial of parties interested.

Within a few days after the presentation of an election petition, signed in a solicitor's presence, while the affidavits accompanying it sworn to before another solicitor, deposed to the presentation of the petition being in good faith, and with reason to believe the statements contained in it were true in substance and in fact and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partially read over to him, some of the statements in which he had since found was wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits.

Held, that in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in the face of their denial by

the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent, to set aside the petition.

Judgment of Moss, C.J.O., affirmed.

Hellmuth, K.C., for appellants. *R. A. Grant*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C., Meredith, J., Idington, J.]

[June 30.

MARTIN *v.* MARTIN.

Will—Construction—Devise—Life interest—"Premises"—Election.

The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set about in his will, in which were the following provisions:

"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life. To my son Joseph Martin the south-west half of the north-west half of lot 10 . . . containing 50 acres . . . also the south-west quarter of lot 10 . . . fifty acres . . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay, etc. My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain or mortgage . . . before he attains his thirty-fifth birthday." Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority. The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph the widow leased the 100 acres, reserving the dwelling-house and out buildings and four acres for herself.

Held, MEREDITH, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life.

Held, also, upon the evidence, that the widow had not elected to take \$200 a year in lieu of "the use of the premises."

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

M. Houston, for plaintiff. *Johnson*, K.C., for defendants.

Boyd, C., Meredith, J., Idington, J.]

[June 30.

IN RE RUSSELL.

Surrogate Courts—Jurisdiction—Accounting—Falsifying inventory of assets.

The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of

Ontario. For full enquiry and accounting resort must be had to the administrative powers of the High Court. Review of English authorities.

Where upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money, not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime,

Held, MEREDITH, J., dissenting, that the judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him.

Order of the Judge of the Surrogate Court of Halton reversed.

H. Guthrie, K.C., for executrix. *J. Bicknell*, K.C., and *J. W. Elliot*, for residuary legatees. *W. A. McLean*, for executor.

Boyd, C., Meredith, J., Anglin, J.]

[June 30.

DOYLE v. DIAMOND FLINT GLASS CO.

Executors and administrators—Fatal Accidents Act—Status of widow—Grant of administration pendente lite—Workmens Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages—New trial.

An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained, as widow, pendente lite, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at \$1,500, apportioning that sum equally between the plaintiff and the mother.

Held, 1. There was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; MEREDITH, J., dissented, being of opinion that there should be a new trial on the whole case.

2. The release given by the plaintiff should not, on the evidence, be held binding on her; ANGLIN, J., hesitating.

3. On the evidence, the mother had no sufficient interest in her son's

life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept \$750.

4. There should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow.

5. If the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action.

Trice v. Robinson, 16 O.R. 433, and *Murphy v. Grand Trunk R.W. Co.*, unreported decision of a Divisional Court, May 27, 1889, applied and followed. Judgment of IDINGTON, J., 7 O.L.R. 747, reversed.

Clute, K.C., and *A. R. Clute*, for plaintiff. *Shepley*, K.C., and *R. H. Greer*, for defendants.

Trial—Meredith, J.]

[July 9.

CITY OF HAMILTON *v.* HAMILTON STREET R.W. CO.

Street railways—Contract with municipality—Payment of proportion of gross receipts—Intra vires—Meaning of "gross receipts."

Covenant by the defendants to pay to the plaintiffs a certain proportion of defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and defendants, a street railway company.

Upon the proper construction of the covenant the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where these passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding.

McKelcan, K.C., for plaintiffs. *Armour*, K.C., and *Levy*, for defendants.

Anglin, J.]

[July, 13.

ATTORNEY-GENERAL FOR ONTARIO *v.* TORONTO JUNCTION RECREATION CLUB.

Company—Cancellation of letters patent—Action by Attorney-General—Order in Council pendente lite—Injunction—Crown—Extra judicial opinion.

An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council.

Held, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R.S.O. 1897, c. 191, s. 99), and merely

Johnston, K.C., for defendants. *Cartwright*, K.C., and *Dewart*, K.C., for plaintiff.

Magee, J.] IN RE CARRIAGE WORKS, LIMITED. [Sept. 12.

Winding-up—Inability to pay debts as they become due.

Held, that s. 6 specifies the only way of proving a case under clause (a) of s. 5, and petition must be dismissed, unless amended, and additional evidence offered within 14 days.

McInnes, for petitioners. *S. B. Wood*, for company.

Cartwright, M.C.] [Oct. 10.

PERRINS, LIMITED v. ALGOMA TUBE WORKS.

Evidence—Discovery—Company—Foreign company—Officer of company.

An order may be made for the examination for discovery of the officer of a foreign corporation, residing in a foreign country, when the foreign corporation has attorned to the jurisdiction of the Courts of this Province.

C. A. Moss, for plaintiffs. Middleton, for defendants.

COUNTY COURT, LEEDS AND GRENVILLE.

Reynolds, J.J.] BIGFORD *v.* BAILE. [October 11.]

Ditches and Watercourses Act—Engineer's award—Time for making directory.

Held, on appeal from the Award of the Engineer of the Township of the front of Yonge and Escott, made under the Ditches and Watercourses Act, R.S.O. c. 285, that the 30 days prescribed by s. 16 (2) of that Act,

within which the engineer is to make his award, is merely directory and not imperative; and where the engineer attended on May 23 under the Act, but did not make his award till August 1, the award would not be set aside on the ground of being made too late.

M. M. Brown, for appellants. *Deacon*, K.C., for respondent.

Province of Manitoba.

SUPREME COURT.

Full Court.]

HUMPHREYS v. CLEAVE.

[July 12.

Mechanics' and Wage Earners' Lien Act—Costs of sale and reference to Master—Limitation of 25 per cent., to what costs applicable.

This was an action to realize a lien under R.S.M. 1902, c. 110, by the ordinary procedure of the Court as provided for by s. 27 of the Act. At the trial the plaintiffs had judgment for \$322.25, and their costs down to and including the trial were taxed at \$190.16 and inserted in the judgment. The defendant was ordered to pay both amounts into Court within one week, and the judgment further provided that in case of default the lands, material, machinery, etc., should be sold with the approbation of a judge of the Court, and that, for the purpose of such sale, it be referred to the Master at Winnipeg, and that all necessary inquiries be made, parties added, accounts taken, costs taxed, and proceedings had by the said Master for the sale of the said property, and that the purchase money should be applied in payment of the plaintiffs' claims as proved, with subsequent interest and subsequent costs to be computed and taxed by the Master. There was no appeal from this judgment. Default having been made by defendant, the lands were sold under the judgment by direction of the Master, and the purchase money paid into Court. The plaintiffs' costs of the proceedings subsequent to the judgment were taxed and allowed at \$229.30, inclusive of disbursements, and the total amount of the costs taxed, exclusive of disbursements, was \$228.75.

Defendant appealed from the taxation of the subsequent costs on the ground that the latter sum far exceeded the limit of 25 per cent. of the amount of the judgment (\$322.25) provided for by s. 37 of the Act.

Held, that the expression in that section, "costs of the action awarded in any action under this Act by the judge or local judge trying the action," refers to the costs up to and including the trial, and means the costs which are allowed by the judge at the hearing and entered in the judgment: *Gearing v. Robinson*, 19 P.R. 192; and that the limitation of 25 per cent. does not apply to the subsequent costs of sale and proceedings before the Master, which may be dealt with by the judge as in other cases.

The judgment empowered the Master to tax and add to the plaintiffs' claims the costs of the subsequent proceedings; and, as the defendant did not appeal from the judgment, the Court could not, on this motion, interfere with its provisions. Under its terms, the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office.

It was further urged by defendant's counsel that s. 39 of the Act applied to this case. That section provides that, where the least expensive course is not taken by the plaintiff, the costs allowed shall not exceed what would have been incurred if the least expensive course had been taken, and the defendant contended that, if the plaintiffs had adopted the alternative mode of proceeding provided for by s. 31, the costs would have been much less.

Held, per RICHARDS, J., that it cannot be assumed that proceedings under s. 31 would have been any less expensive than those that had been taken.

Per PERDUE, J., that the question as to the least expensive course should have been dealt with, if at all, by the judge who tried the action, and the taxing officer had no power, without a special direction in the judgment, to determine which would have been the least expensive course and to limit the plaintiffs' costs accordingly.

Appeal dismissed with costs.

Hoskin, for plaintiffs. *Hudson*, for defendant.

Full Court.]

CALLOM v. McGRATH.

[July 12.

Conditional sale—Lien note—Verbal agreement at time of sale to give lien note afterwards—Priority as between chattel mortgage and lien note given subsequent to purchase.

Appeal from a County Court in an action for wrongful conversion of three cows which the plaintiff had sold on credit and delivered on Dec. 10, 1903, to one Coaker under a verbal agreement that Coaker would give plaintiff a lien on the cows by signing a lien note, there being no form of such note available at the time. Plaintiff afterwards procured a blank form of such note and had it filled up and signed by Coaker on Dec. 31. On Jan. 21 following, Coaker gave defendant a chattel mortgage on the cattle to secure a debt of \$134, and the chattel mortgage was duly registered. Coaker having made default, the plaintiff tried to get possession of the cattle in March, but was prevented from so doing by defendant who took possession under his chattel mortgage. Plaintiff then brought this action in which he had a verdict.

Held, that under sub-s. (a) of s. 26 of The Sale of Goods Act, R.S.M. 1902, c. 152, the defendant's title to the cattle was better than that of the plaintiff, as defendant had received the chattel mortgage in good faith and without notice of any lien or other right of the plaintiff in respect of the

cattle; and that the case was not within the exception provided for by sub-s. (b) of the same section, because Coaker was not a person who had "bought or agreed to buy the goods under a contract or agreement in writing, signed by him, providing that the property in or title to the goods should not pass to the buyer until payment in full of the price thereof." When Coaker took possession there was only a verbal promise by him that he would sign such a contract or agreement when called upon, but the statute requires that the writing should be signed before or at the time of the delivery of the goods, or so soon thereafter as to form part of one transaction.

Appeal allowed with costs.

T. R. Ferguson, for plaintiff. *Potts*, for defendant.

Full Court.]

[July 29.

IN RE ASSESSMENT ACT, 1903, AND NELSON AND FORT SHEPPARD RAILWAY CO.

Assessment Act, 1903—Wild lands—Valuation of—Average value per acre—Assessor acting on instructions from superior officers—Exemption from taxation under—Jurisdiction of Court of Revision to deal with question of exemption.

Appeal by the company from the decision of a Court of Revision and Appeal. In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at \$1 per acre for the whole tract. On appeal to the Court of Revision and Appeal evidence was taken and an average value of 45 cents per acre was fixed. An appeal was taken to the Full Court on the grounds that the valuation was too high, and that so far as some of the lands were concerned they were exempt from taxation under the Company's Subsidy Act, and on the argument counsel for the company asked the court to fix the assessable value of the lands at the specific sum of \$47,986.23.

Held, per DRAKE, J.: That as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs.

Per IRVING, J.: The evidence did not enable the court to form any opinion as to the value of the land within the meaning of s. 51, and as the assessment was improperly levied at the outset the court should simply declare that there was no proper assessment in respect of which an appeal will lie.

Per DUFF, J., dissenting: 1. The evidence was adequate to enable the court to fix, as against the appellant, the assessable value of the lands.

2. The court has power to deal with the assessment even though it was not made in accordance with the statute.

3. In fixing the value of a tract of wild land a process of averaging is reasonable and a compliance with the statute.

Per DRAKE and IRVING, JJ., DUFF, J., dissenting: That by the operation of s. 3 of the Amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1893, and that therefore the lands claimed to be exempt were assessable.

Per DUFF, J.: The Court of Revision under the Assessment Act, 1903, had no jurisdiction to decide whether or not the lands in question were exempt from taxation, and consequently the Full Court has no jurisdiction to deal with that question.

MacNeill, K.C., for the company. *John Elliott*, contra.

Richards, J.] MASSEY-HARRIS CO. v. MOLLOND. [August 15.

Sheriff—Negligence of bailiff—Liability for loss of stolen money—Satisfaction of judgment when sufficient goods seized—Sale under fi. fa. immediately after seizure.

Application by the executors of the estate of the defendant on notice to the sheriff and the plaintiffs for an order for the entry of satisfaction of the plaintiffs' judgment against the defendant under the following circumstances:—The sheriff having received a fi. fa. goods on the judgment, and also one for another creditor, sent warrants to his bailiff, Adams, to realize thereon. The defendant died, and his executors decided to sell his chattels by auction, and employed Adams, who was an auctioneer, to conduct the sale. Adams advertised the sale as being by order of the executors, to be held on April 5, 1901. On his arrival at the place of sale he seized the goods under the fi. fas. and notified the executors and their solicitor. The sale was then proceeded with, none of the buyers knowing anything about the fi. fas. Some of the chattels were paid for in cash and others by promissory notes made payable to the executors, the money and notes being handed over to Adams at the close of the sale.

The Union Bank of Canada had a mortgage on some of the chattels, and, at the request of the bank's solicitor, Adams agreed to hold the money and notes until the bank should be paid off by the executors out of other funds. Adams afterwards collected the amounts of the notes, and, instead of putting the money into a bank, he kept it along with the other money in an ordinary cash box in his office, from which it was subsequently stolen. After this, the executors paid off the bank's claim, and then paid the sheriff a sum which, with the money stolen from Adams, was sufficient to discharge both executions. Adams paid nothing to the sheriff on the executions, and the sheriff paid nothing to the plaintiffs, and claimed that he was not bound to account to them for anything beyond the sum received directly from the executors.

Held, following *Gregory v. Cotterell*, 5 E. & R. 571, and *Smart v. Hutton*, 8 A. & E. 568 n., that the sheriff was responsible for the acts of the bailiff and was bound to account for the money received by the latter.

A seizure of sufficient goods by the sheriff is in itself a discharge of the debtor: *Clerk v. Withers*, 2 Lord Raymond, 1072; and therefore a seizure of sufficient goods to make part of the debt is a discharge quoad that part. It was the duty of the bailiff to deposit the money in a bank for safe keeping, and it made no difference even if the executors had assented to the retention of the money to secure the claim of the bank.

The loss was the result of gross carelessness on the part of Adams, and that carelessness was, in law, the carelessness of the sheriff himself so far as liability to others was concerned.

Held, that the judgment had been discharged, that the signature of the plaintiffs to the satisfaction price should be dispensed with, and that satisfaction of the judgment should be entered; costs against the plaintiffs and the sheriff.

Robson, for plaintiffs. *Wilson*, for executors.

Province of British Columbia.

SUPREME COURT.

Full Court.]

BORLAND v. COOTE.

[April 18.

Statute of Frauds—Agreement for sale of land—Description of property—Latent ambiguity—Evidence to identify—Specific performance—Appeal—Introducing fresh evidence—Acquittal for perjury alleged to have been committed at civil trial—Proof of not allowed on appeal in civil action.

B., on behalf of D., negotiated with C. for the purchase of C.'s property on the north-west corner of Hastings Street and Westminster Avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price leaving the description blank for C. to fill in, as he did not know the Land Registry description, but adding the description "north-west corner, etc.," below the space reserved for C.'s signature. B. took the receipt to C. and paid him \$10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner and were owned by C. B. sued to have the agreement or receipt rectified or reformed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed.

Held, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement.

For perjury alleged to have been committed at the trial by the defendant he was tried and acquitted before the hearing of the appeal, and, on the appeal, his counsel moved the Full Court be allowed to read the verdict of the jury in the criminal trial. The Court dismissed the motion IRVING, J., dissenting.

Martin, K. C., for appellant. *Davis*, K. C., and *Bowser*, K. C., for respondent.

Court of Criminal Appeal.]

[June 21.

REX v. WONG ON AND WONG GOW.

Criminal law—Judge's charge to the jury—Murder—Manslaughter Definitions—Failure to instruct jury as to—Failure to object to charge—New trial.

Crown case reserved.

Held: 1. It is the duty of the judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences, if any. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the judge's charge is immaterial.

2. After the case for the Crown and defence was closed, the Crown called a witness in rebuttal whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, and which tended to weaken the alibi set up by the accused.

3. To allow the evidence was entirely in the discretion of the judge and there was no legal prejudice to the accused as he was allowed an opportunity to cross-examine and meet the evidence.

Conviction of murder set aside and new trial ordered.

Taylor, K.C., for the prisoners *Belyea*, K.C., for the Crown.

Duff, J.] MUIRHEAD v. SPRUCE CREEK MINING CO. [Sept. 20.

County Court—Stay of proceedings under s. 34—Whether applicable to proceedings under mining jurisdiction—Prohibition.

On an application for prohibition.

Held, allowing the application, that s. 34 of the County Court Act, which provides inter alia that if in any action of tort the plaintiff shall claim over \$250.00, and the defendant objects to the action being tried in County Court and gives certain security, the proceedings in the County

Court shall be stayed, applies to proceedings in the County Court under the mining jurisdiction of that Court.

Belyea, K.C., for the application. *Kappele*, contra.

Book Reviews.

The Law of Waters and Water Rights, international, national, state, municipal and individual; including irrigation, drainage and municipal water supply. By HENRY PHILIP FARNHAM, M. L. (Yale), Associate Editor of *The Lawyers' Reports*, Annotated. Vol. 1. Rochester, U. S. The Lawyers' Co-operative Publishing Company, 1904. Canada Law Book Co., Toronto, Canadian Agents.

This book and Mr. Labatt's work on Master and Servant are the most exhaustive, complete and satisfactory law books which have been given to the press for many years past. They are similar in character and each of them tells us all that can be said on the subjects treated.

The work before us takes up the general subject of waters in every one of its numberless ramifications, giving a complete analysis and exposition of everything with which water has a direct or a remote connection. It is evident that to accomplish this no labour has been spared, and it is claimed that every volume of every series of reports, American, Canadian, and English has been examined page by page. The result is certainly most satisfactory. The book is both analytic and synthetic, so that the practicing lawyer not only has before him the fundamental principles, but the application of these principles to the multitudinous variety of circumstances with which the courts have had to deal in connection with a subject which is as wide as the ocean, and as intricate as the rivers and streams which traverse the continents.

The author deals not only with the subjects which are ordinarily discussed in treatises on waters and water-courses, but takes up a variety of matters not hitherto included in such works, e. g., municipal water supply and sewage, questions between landlord and tenant as to water taxes, drainage water-pipe, etc.; how railroads are affected; questions of eminent domain; the involving and acquiring of water rights and injuries thereto; nuisances; surface waters, etc., etc.

The table of contents alone contains over thirty pages of closely printed matter. The examination of a work such as the one before us and the few others of a like character, fills one with amazement at such a display of dogged industry. We have in fact a complete encyclopaedia of the law, making it a waste of time to look elsewhere for anything that can be said on the subject.

**HON. MR. JUSTICE RUSSELL,
HALIFAX.**

THE HISTORY OF THE

REIGN OF

CHARLES I.

BY

JOHN BURNET

OF

GLoucester

IN

THE

REIGN OF

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OF

THE JOURNAL OF THE
ROYAL ANTHROPOLOGICAL INSTITUTE

Canada Law Journal.

VOL. XL.

NOVEMBER 15, 1904

NO. 22.

For the purpose of giving to our readers a fairly complete summary of the law applicable to the main features of the subject of Trades Unions, we publish in this issue an article from a contributor in the United States. He collects and comments upon the leading authorities in that country dealing with that important subject. The reference of the writer to the early English cases, to be found in the musty tomes of the Henrys, is interesting as showing that there is "nothing new under the sun" even as to this, so-called, modern grievance, except the name "boycott," by which it is best known.

Though the thought conveyed thereby is both barbarous and brutal, the maxim that "to the victors belong the spoils" will be the rule until the millenium comes. We do not propose, therefore, to quarrel with the inevitable; but we do protest, on behalf of those concerned, against the distribution of some of the spoils. Existing governments must, of course, make all appointments necessary for the administration of justice. The necessity that judges should be lawyers is a fact which politicians must most deeply deplore, but there is no such necessity in the case of Sheriffs, Registrars, Surrogate and County Court Clerks, etc. It is generally admitted, and certainly cannot be denied, that positions such as these would be much better filled, and with more advantage to the public, by lawyers than by laymen; and so it borders on the ludicrous to see them given to men taken out of the ranks of auctioneers, bakers, farmers, builders, millers, store-keepers, etc. These men are, doubtless, worthy citizens, and, we may suppose, have done good work for their bosses: but why should available men in the legal profession, who would be glad of such jobs, who have done equally good service, and whose education and legal knowledge fits them for such offices, be passed over. The wonder is that those of them who belong to the party in power put up with it. Lawyers on both sides of politics are more valuable from a party standpoint than any other class, but are contemptuously ignored when the spoils are divided. They do not protest against the injustice. We make bold to do so on their behalf.

**INTERFERENCE WITH BUSINESS AND COMMERCIAL
RELATIONS BY THIRD PARTIES.**

I. INTRODUCTORY.

- 1. Scope of this article.**
- 2. Rise and growth of trades unions.**
- 3. Statement of some general principles.**

II. ESSENTIALS OF A BOYCOTT AND ACTIONABLE WRONGS.

- 1. Meaning and definitions.**
- 2. What boycotts are considered lawful.**
- 3. Conspiracy.**
- 4. Malicious intent.**
- 5. Violence and intimidation.**
- 6. Interference with respect to contractual relations.**
- 7. Black-listing.**

I. INTRODUCTORY.

1. Scope of this article.—Whilst this subject might with interest and profit be treated from other standpoints, such as the ethical and the economic, it is intended at present to treat the subject of boycotts and kindred practices appertaining thereto from the legal point of view alone, and to attempt to classify the decisions of the Courts (having a special reference to those of the United States) in defining the essentials that comprise actionable wrongs. The limitations of this article preclude the mention of many details, and the use of much helpful illustration. One relevant and important topic has also necessarily been omitted, viz., the equitable jurisdiction of Courts and the relief which equity would be justified in granting.

2. Rise and growth of trade unions.—To-day as the logical, necessary, and legitimate counterpart of the large corporation, we have the trades unions. Neither the right nor the expediency of such organizations is questioned. Co-operation by and between those having like interests to guard and foster is but a heritage from the impulses that rescued man from his primæval segregate state, and induced him to seek a higher plane as a factor in the social unit. It has been a cherished principle of our courts that the genius of our free institutions, social, political, and industrial, encourages men to seek greater fortunes and larger opportunities in life; and that combinations of labouring men for the purpose of securing greater wages for their hire, or self-improvement in any

way, and of capital to mass together its strength to enlarge industrial activities, are legitimate and commendable. It is adjudged ignoble to do so only as wantonly irrespective of the legal rights of others.

3. Statement of some general principles.—A serious difficulty has arisen in determining what means the individual or organization may employ in enforcing its demands upon another individual or organization, and in distinguishing to what extent one is immune in business from the encroachments of another.

In *Beck v. Railway Teamsters' Protective Association*, 42 L.R.A. 407, in which the defendant association by violent and coercive measures had attempted to dictate what men the plaintiff should take into his employ, the court seems to state fairly the rule for the case involved. Speaking of the employer, it was stated: "The law protects them in the right to employ whom they please, at prices they and their employer can agree upon, and to discharge them at the expiration of their term of service, or for violation of their contracts. This right must be obtained or personal liberty is a sham." Continuing further, and speaking of the employed, it was said: "So also the labourers have a right to fix a price upon their labour, and to refuse to work unless that price is obtained. Singly or in combination they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization or to refuse to work except for an established wage; they may present their case to the public in newspapers, or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such a case is to ruin the employer it is *damnum absque injuria*, for they have only exercised their legal right. The law does not permit either party to use force, violence, threats of force or violence, intimidation or coercion."

Akin to the principles stated above is to be noticed what is comprehended in the term "competition"—what certain acts are licensed within its domain, and what are not. It is a principle of law, long and fully established, that one has no legal protection from the sharpest competition by those engaged in a similar business, and defendants at the bar have constantly sought to justify their tortuous acts as within the legalized scope granted by mere competition. But in doing so they have often made a fatal

error. In combining for a just attainment, they have often devised means that could only stifle and destroy competition itself, and shut others out from the rights and benefits which they themselves were claiming. While what competition really means, and the application of the principles sanctioned by it have raised serious and perplexing questions, the courts seem to have met them fairly and to have found their solution in old established principles not different from those generally invoked in determining liberty and license of action by one person toward another. It is when one oversteps the line and attempts to enhance his own interests by tearing down the lawful business of another through fraud and violence, prompted by a malicious motive, that his acts cease to be competition alone, and become actionable wrongs (a).

The courts have not only observed great injustice in the permitting of business enterprises to be dominated by boycotts, but have also given expression to the great dangers that would be attendant with such practices. Nothing jeopardizes the business interests of a commonwealth more effectively than a feeling of insecurity. When one invests his money in a business enterprise it is necessary for him to know whether his own judgment may direct its management and detail, or whether the violence and ignorance of others is to supplant him. Business men have a general idea of their rights and immunities under the law, and a confidence of their enforcement which is indispensable. Neither does our sense of justice allow that a business should be dictated and controlled by those who have no interest therein and no capital invested, who are in no way responsible for its losses or failures and receive no direct benefit in its success, and are non-participants in the profit. If, for example, a labour union may by coercive measures control in the employment of help by a corporation, stipulating as to whom they shall employ, and the wage that shall be paid, where is the dictatorial power going to be made to end. It would not be confined to matters of employment. Power thus given would be insatiate in its demands for more, and precedents furnish no guaranty of a moderate and reasonable use of it; indeed, the direst acts known to time, and those which humanity most regrets have been wrought by men in the exercise of irresponsible power.

(a) 2 Bishop's Criminal Law, s. 230, note; *Hilton v. Eckersley*, 6 E. & B. 47; *Carew v. Rutherford*, 106 Mass. 1.

II. ESSENTIALS OF A BOYCOTT AND ACTIONABLE WRONGS.

1. Its meaning and definitions.—Let us now consider what the boycott really is, and what the essentials of boycotting are that will constitute an actionable wrong. Some mention must be made from both the standpoint of the civil action and from that of the criminal action, as they are not in all respects similar.

It will be observed from the statements made that both parties in the subject under discussion have rights which, perhaps, though not strictly so in all phases, may, with general propriety, be called inherent ; therefore an amicable and praiseworthy solution of differences is to be obtained by negotiation and adjustment by and between the opposed forces, with the limitations of each to be prescribed by the courts of justice.

A boycott, as commonly understood, "is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse through threats that unless those others do so, the many will cause similar loss to them" (b).

Black's Law Dictionary defines a boycott as "a conspiracy formed and intended directly or indirectly to prevent the carrying on of a lawful business or to injure the business of anyone by wrongfully preventing those who would be customers from buying anything from or employing the representatives of said business, by threats, intimidation, or other forcible means."

The Century Dictionary defines a boycott to be "an organized attempt to coerce a person or party into compliance with some demand, by combining to abstain or compel others to abstain from having any business or social relations with him or it ; an organized persecution of a person or company as a means of coercion or intimidation or other forcible means."

Fauntelroy, J., thus states it : "The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators." (c).

(b) *Toledo, etc., Ry. Co. v. Penn. Co.*, 54 Atl. 730.

(c) *Crumph v. Commonwealth*, 10 Am. St. Rep. 895.

a duty which they owed to the public. It has also been adjudged unlawful for journeymen tailors to agree to quit peaceably in a body when a large number of garments were unfinished, but this is believed a wide extension of the rule in permitting action to be brought unless on contractual relations. Another writer, by way of illustration, states that trades unions may with impunity combine to boycott goods that do not bear the union label, and that temperance organizations could legitimately agree to boycott goods sold by a groceryman who is also the vendor of liquors.

The English case, *Allen v. Flood* (1898) A.C. 156, is interesting in this connection. A representative of the ironworkers on a ship procured the discharge of two shipwrights, also working thereon, under a threat to the employer that unless the shipwrights were so discharged the ironworkers would quit. The shipwrights were discharged, and because of this brought action in tort against those who had procured their dismissal. The plaintiffs recovered a verdict below, but the decision was reversed in the House of Lords by a vote of six to three. However, in the successive courts, out of twenty-one judges and lords, thirteen held the act of the ironworkers an actionable interference with labour. The lords appear to have based their opinion on the grounds that there was no conspiracy, and the employer was induced to break no contract in discharging the plaintiffs.

In *Bohn Manufacturing Company v. Hollis*, 54 Minn. 223, the defendants were retail lumber dealers, and formed a voluntary association whereby they mutually agreed not to buy of any wholesale dealers who should sell lumber to persons, not dealers, at any place where a member of the association was carrying on business. The object of the association appears to have been to protect its members against sales by wholesale dealers to contractors and consumers. A dealer having made such a sale, the secretary of the association was about to issue a circular to its members, apprising them of the fact, when the plaintiff brought action to have him enjoined from so doing. The injunction was denied and the case dismissed. The court reasoned that the defendants had similar legitimate interests to protect, that their association was a voluntary one, using no coercion, and that there was no agreement to induce others to enter into the boycott. The court also inferred that the practice of the wholesale dealers in selling to contractors and consumers was a menace to the business

of the defendants, against which they might protect themselves by lawful combination.

Chief Justice Shaw, in his able opinion in *Hunt v. Commonwealth*, 4 Met. 111, in which certain members of the Boston Journeymen Bootmakers' Association were indicted for conspiracy in attempting by combination to raise their wages, and which opinion has been understood to decide that working men unquestionably have the right to combine together for such a purpose, although the opinion was written merely to decide the sufficiency of the indictment as framed, said : " Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. A workman who should still persist in the use of ardent spirit would find it more difficult to find employment ; a master employing such an one might at times experience inconvenience in losing the services of a skillful but intemperate workman. Still it seems to us that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy." A long line of decisions agree that certain boycotts and combinations are not repugnant to legal principles when their object, and means of attaining it, are not unlawful. However, as stated above, the courts do not in all instances agree as to what may be considered lawful, and some have taken a lessliberal view than that stated, by Chief Justice Shaw, *supra* (k).

Conspiracy.—As before stated, the accepted definitions of a boycott are all made to rest upon the idea that a combination or conspiracy obtains. However, in regard to the civil action against a boycott, the term "conspiracy" may properly be used only in forming a descriptive definition. There is, strictly speaking, no civil action against conspiracy (l), nor is it necessary that a conspiracy exist that a plaintiff may have a right of action because of wrongful interference with his business relations (m). Parties affected by a conspiracy may waive a criminal prosecution, and

(k) *State v. Stewart*, 59 Am. Rep. 710.

(l) *Biglow on Torts*, 214 ; *Cooley on Torts*, 125.

(m) *Robinson v. Parks*, 14 Atl. 411.

bring an action for damages where injury has been sustained (*n*), but the gist of all civil actions for damages is the actual damage sustained and not the conspiracy, or confederating together (*o*). The plaintiff must shew a cause of action irrespective of a conspiracy, although proof of a conspiracy is usually necessary as a matter of evidence where the acts alleged are of such a nature as to preclude the idea that they could have been done without a conspiracy existing.

A review of the penal statutes of the several States of the Union as to boycotts and labour combinations (for a compilation of which the writer is indebted to the Sixteenth Annual Report of the Commissioner of Labour, 1901) shews that twenty-four States have made such combinations an indictable offence under statute; also two other States have thought it necessary to protect labour organizations by special statute, giving them a guaranteed range that shall not be regarded a conspiracy. These statutes are in slight respects different, and subject to interpretation by the respective State courts, but, in general, they seem to make the subject of criminal prosecution the mere conspiracy to do those acts, and by those means, which, if accomplished, would form the gist of a civil action. As the differences existing with respect to actions brought under the statute, and where no statute exists, are more properly matters of pleading and procedure they will not be discussed here.

While the statement just made as to the application of the statutes is believed correct, it is interesting to notice how at times the Legislatures in passing them have, in defining a conspiracy, abrogated the common law meaning of the term, aided by some holdings thereunder that do not seem fully sound, but which it is believed have, in the main, been cured by subsequent legislation. The State of New York furnished a good example where probably the first trial in this country for conspiracy to raise wages occurred in 1741, in which bakers were convicted of conspiracy for refusing to bake until their wages were raised (*p*), and the same principle was adhered to again in 1810. In 1834, Judge Savage, in the noted case of *People v. Fisher*, 4 Wend. 9, held certain journeymen shoemakers liable for conspiracy for merely agreeing

(*n*) *Herron v. Hughes*, 25 Cal. 555.

(*o*) Am. & Eng. Enc. of Law, vol. 6, page 873.

(*p*) Trial of Journeymen Cordwainers, p. 83, (1810).

together not to work until better wages were obtained. This decision was rendered in construing the agreement to be "an act injurious to trade or commerce," which by statute was a penal offence. This case was considered an authority for the proposition that working men could not combine to peaceably raise their wages in New York without forming an unlawful conspiracy, which rule was followed until 1870, when its harshness was realized, and a more liberal one was adopted by statutory enactment.

Whether or not a conspiracy exists depends upon whether a lawful object is sought, or whether lawful means are being employed in its accomplishment, both of which must be determined by considering what elements constitute a lawful or unlawful purpose, and what means may with impunity be employed.

4. Malicious Intent. — The terms "malice," "motive," and "intent" are used in a liberal sense in the books, and in their application are not clearly differentiated. Malice is constantly referred to as an essential of a boycott, and boycotting, when actionable, as a malicious wrong. It seems, however, that the term "malice" should find its application respective to the intention of the offender, and not to his motive. In *Barr v. Essex Trade Council*, 30 Alt. 881, the court said: "When we speak in this connection of an act done with a malicious motive it does not necessarily imply that the defendants were actuated in their proceeding by spite or malice against the complainant in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do." It is a malicious wrong to intentionally do those things, without legal excuse, that will in the natural course of events injure another in his lawful pursuits and attainments. Malice does not mean merely an intent to harm, but an intent to do a wrongful harm or injury, and if the said acts are wrongful, malice will be implied, and the wrong done a malicious one (q). In *Keeble v. Heckeringill*, 11 Eastern 573, note, the defendant had persisted in firing guns to frighten away wild fowl about to enter plaintiff's decoy pond. In discussing the case Lord Holt said, relative to the intent: "If the defendant had merely set up a second decoy, no action would lie; but it is otherwise where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood."

(q) *Doremus et al. v. Hennesly*, 52 N. W. 924.

5. Violence and intimidation.—It has sometimes been difficult to determine what acts were comprised in these terms because of the shrewdly concocted subterfuges that offenders have invented to cover their malicious deeds. The law, however, looks rather to the object and effect than to the means employed. For a trades union to place a "picket" around the premises of one boycotted is an act of intimidation, and "actual violence or threat of violence is not needed to make a boycott unlawful when intimidation and coercion are employed to prevent persons from dealing with the persons boycotted" (r). It was held to be a threat of violence when a trades union informed one whom they wished to boycott that they had substantially ruined the business of certain other persons (s). A simple request by a body of strikers under circumstances that convey a threatening intimidation is held to be no less obnoxious than to use physical force (t). The display of banners with a mere request thereon to boycott the plaintiffs was held to be an act of intimidation because of the power that was known to exist to enforce the request, and it was held not necessary that the intimidating acts be done on the premises of the plaintiff (u). It is therefore seen that intimidation and threats of violence cannot be entirely hidden under sophistry and pretenses, but that intent and results will be made to govern.

6. Interference with respect to contractual relations.—It seems now fairly well settled that a body of working men have a right to "walk out" at any time when not under contract, and even though they are, the courts will not enjoin them from so doing (v). But the law imposes upon third persons certain duties enjoining interference with the business relations of others. When such persons have procured a breach of contract, and action has been brought against them therefor, they have sought to defend on the ground that a contract cannot impose any obligation upon a person not a party to it. While this proposition is not denied, it is not allowed to excuse the one who has maliciously procured the breach, and he is held liable for the wrong (w).

The courts have refused to recognize any special difference between the interference when contractual relation exists and when

(r) *Beck v. Railway Teamsters' Protective Assn.*, supra.

(s) *State v. Glidden*, 55 Conn. 46.

(t) *Re Doolittle*, 23 Fed. Rep. 545.

(u) *Beck v. Railway Teamsters' Protective Assn.*, supra.

(v) *Arthur v. Oakes*, 63 Fed. 310.

(w) *Walker v. Cronin*, 107 Mass. 555; *Lumley v. Gye*, 2 E. & B. 216.

it does not, the means and results accomplished forming the basis of the action (*x*). Perhaps the only distinction to be noticed in this country is a tendency of the courts in some cases to be more liberal with offenders who have by their malicious acts only induced others to do what they, the others, had a right to do, but would not have done but for the force brought to bear upon them. In a well reasoned case, handed down by the Supreme Court of Maine in 1897, the following statement of what is believed to be the general rule is given: "Our conclusion is that wherever a person by means of fraud or intimidation procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract definite as to time is broken, or that an employer is induced, solely by such procurement, to discharge an employee, whom he would otherwise have retained (*y*).

7. Black-listing.—This is a practice analagous to boycotting as it interferes with freedom in obtaining employment. It rests, however, on a slightly different basis from the legal standpoint, as the act itself is deemed dangerous and against public policy and cannot be defended on any ground. This statement is true, however, only of the eighteen States that have special statutes prohibiting black-listing, and corporations from exchanging blacklists with each other. In those jurisdictions where there is no statute a civil action would lie for the wrong committed that had worked an infringement on the rights of another. It is believed that good policy dictates that blacklisting should be dealt with according to the same principles as those that define other torts, that is to say, that when a blacklist is formed, it must be without malice or prejudice towards those whose names are thus defamed, clear of all fraud, and only a true statement of facts. A further extension of immunity than this deprives an employer of profiting from the costly experience of others, and the public of one means of security against the employment of profligate employees, and throws about the unskillful and unworthy a protection greater than past achievements have made them to deserve (*z*).

WM. H. WARREN.

(*x*) *Hopkins v. Slave Co.*, 83 Fed. 912.

(*y*) *Perkins v. Pendleton*, 38 Atl. 96.

(*z*) *Hurdley v. L. & N. R. R. Co.*, 48 S. W. 429.

DOG-LAW IN DOGGEREL.

BY CHARLES MORSE.

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I. DOGS AND TRESPASSERS.

SARCH v. BLACKBURN. 4 C. & P. 297.*REGULA: Contra nocentem tenere canem non est culpa.*

I sing the old Ford watchman : (What better name than Sarch
For him who spent his vigils in dogging mischief's march?)

But Fate, with her grim ironies, ne'er lets us go unflogged ;
And this dog's tale unfolds to us how doggers may be dogg'd.

Defendant was a milkman ; and, lest his patrons saw
How milk and water coalesce, he kept a canine jaw

To fright away all trespassers ; and up this legend nailed :
"Beware the dog!"—a sign before all hearts but Sarch's quailed.

'Twas not so much that Sarch's nerve proclaimed heroic breed,
As that the plaintiff in his youth had not been taught to read.

One summer morn, his duties done, the plaintiff left his beat,
And plann'd to cut through Blackburn's lot and save his weary
feet.

In vain kind Phœbus threw his rays on that portentous sign ;
Unletter'd Sarch maintained his march past pigs, and fowl and kine.

The kennel's near, yet no one warns—the men are in the mews,
A moment more and Towser's teeth are fastened in his trews !

Though homespun's tough, 'twas not enough those sharp teeth to
enmesh ;
A lucky Shylock Towser proved—he *got* his pound of flesh !

Nota.—By no exercise of poetic license may a dog be set down as able to remove a pound of carnous tissue at one fell bite, hence we feel it incumbent upon us at this juncture to unhorse the reporter from Pegasus, and bid the latter go to grass, the former to prose, so that Sarch and his cause may be reported aright.

The following proposition of law is a fair deduction from the instructions of Tindal, C. J., to the jury in this case: *A person is justified in keeping a dog in his yard for the protection of his premises, and if one in the act of trespassing upon such premises is bitten by the dog, he has no right of action against the owner.* But the learned Chief Justice said that a man has no right to keep a ferocious dog in such a situation, in the way of access to his house, that a person coming there for a lawful purpose may be injured by it. In such a case the owner of the dog could not excuse his liability by showing that he had posted up a danger notice by which the person injured might have been put on his guard had he read it. (See also *Brock v. Copeland*, 1 Esp. 203; *Curtis v. Mills*, 5 C. & P. 489.)

In the United States it is no defence for the defendant in an action for keeping a vicious dog to show that the plaintiff was at the time trespassing upon the defendant's property, for the purpose of hunting (*Loomis v. Terry*, 17 Wend. [N.Y.] 496); or of picking berries (*Sherfey v. Bartley & Sneed* [Tenn.] 58); or for no particular purpose (*Pierret v. Moller* 3 E.D. Smith [N.Y.] 574). Concerning a householder's right, in general, to protect his grounds, Cowen, J., said in *Loomis v. Terry* (*supra*): "As against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that, in these and the like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way." See the Quebec case of *Dandurand v. Pinsonnault* (7 L.C.J. 131), decided under the Civil law, but enunciating practically the same doctrine as that of the above cases in the American Courts.

II. THE SCIENTER IN DOG-LAW.

Sing, tuneful Muse, from your Pierian dell,
(You'll have to help me for I don't sing well!)
Please sing the *Canidæ*, you will not weary us—
We're sober lawyers, though our star's not Sirius!
(Tis pale *Astraea* beckons us to Heaven—
Adumbrative in Coke, but clear in Beaven.)

What dearer theme than dogs our pen bestirs?
Man loves them all—both thoroughbreds and curs.
Perchance they've souls—now prithe, don't say
"Pshaw"!—

Mens rea's theirs in Massachusetts' law.¹
'Tis true that legislation frets them now;
But that's because their ranks unduly grow
In cities, where our nerves get such ill-usance
They oft regard sweet singing birds a nuisance.
But dogs at common law were treated well
If honest truth the old Reporters tell.
Ferae naturae non, the cases say,
Down from the time of Sir John Holt, C. J.²

¹Hathaway v. Tinkham, 148 Mass. 65.

²Mason v. Keeling, 12 Mod. 332.

"Bad law," you cry, with Towser at your calf;
 "Yet law," replies his owner with a laugh.
 You go to Court, the dog is cleared amain:
 "He's bit but once—and may not bite again";³
 "A dog, forsooth," (thus runs the Court's advice)
 "Is mansuete till he's lunched upon you twice!"⁴
 But after that he's no experimenter,⁵
 He's *ferus*, and you set up the *scienter*.⁶
 So far from mercy then the dog recedes
 He may be hung for his carniv'rous deeds.⁷
 And in his dining he can't wait for curries,
 A half-hour's fatal 'twixt to single worries.⁸
 Nor, if provoked to make bite "number two,"
 Will that avail to shield him from his rue.⁹
 Aye, more, once Towser bites, he may be brought,
In proprio corpore, before the court;
 There to assist the drowsy jury's mind
 In judging if his owner deemed him kind;¹⁰
 And if the jury learn he has been chained,
 Thus the *scienter* they may find maintained.¹¹
 In self-defence a bite's within the law,
 But let the dog bite quick or hold his jaw;
 If he delays and later vents his spite,
 He's simply slept upon his legal right.¹²
 "If I am bitten, I may kill!" you say:
 Not so if Towser bites and runs away.¹³
 (The Muse digresses—but not ours to damn:
Que voulez-vous? Peste! C'est méthode de femme.)
 A man may keep a vicious dog to guard
 His curtilage—but let him be in ward;

³ *Fleeming v. Orr*, 2 MacQ. H.L.C. at p. 25.

⁴ *Ibid.*, at p. 23.

⁵ *Beck v. Dyson*, 4 Camp. 198; *Vrooman v. Lawyer*, 13 Johns. (N.Y.) 339.

⁶ *Spring Co. v. Edgar*, 99 U.S. at p. 654.

⁷ *Per Lee, C. J. in Smith v. Pelah*, 2 Strange 1264.

⁸ *Parsons v. King*, 8 T.L.R. 114.

⁹ *Smith v. Pelah (supra)*; *Fake v. Addicks*, 45 Minn. 37.

¹⁰ *Line v. Taylor*, 3 F. & F. 732.

¹¹ *Jones v. Perry*, 2 Esp. 482.; *Webber v. Hoag*, 8 N.Y. Supp. 76.

¹² *Keightlinger v. Egan*, 65 Ill. 235; *Linck v. Scheffel*, 32 Ill. App. at p. 20.

¹³ *Morris v. Nugent*, 7 C. & P. 572.

If *licensees* are bitten when they enter,
 A judgment's theirs *sans* proof of the *scienter*.¹⁴
 But *trespassers* at night fare not so well,
 They risk the canine being kind or fell.¹⁵
 Tho' when *you* trespass, with your dog appendant,
 His bite will throw all burdens on defendant.¹⁶
 E'en harbouring a dog you do not own
 Will mulct you if his viciousness be known.¹⁷

EPILOGUE.

And so the doctrine runs at Common Law,
 When mortals suffer from the canine jaw.
 So, be he bitten, 'tis beyond dispute
 A man is worser off than a dumb brute.
 For when of sheep your dog proves a tormenter
 The plaintiff need not set up the *scienter*;
 You're liable by statute, and are fined
 Whether you knew the culprit fierce or kind.
 The moral is : *Guard Towser all you can ;*
But when he bites, pray let him bite a man !

¹⁴Smillie v. Boyd, 24 Sc. L.R. 148; Muller v. McKesson, 73 N.Y. 195.

¹⁵Sarch v. Blackburn, 4 C. & P. 297; Loomis v. Terry, 17 Wend. (N.Y.) 497.

¹⁶Beckwith v. Shoredike, 4 Burr. 2092; Green v. Doyle, 21 Ill. App. 208.

¹⁷McKone v. Wood, 5 C. & P. 1; Wood v. Vaughan, 28 N.B. 472.

**THE LIABILITY OF A MANUFACTURER FOR INJURIES
TO THIRD PERSONS RESULTING FROM IMPROPERLY
CONSTRUCTED ARTICLES.**

This paper will have nothing to do with the liability of the manufacturer and seller of goods to the purchaser, for injuries resulting to the purchaser by reason of the unsafe or defective condition of the thing sold. Only questions arising between the manufacturer and third parties, between whom there is no contractual relation, come within the scope of this discussion.

General rule of liability.—A party is required to respond in damages to another for an injury sustained by the latter only when such injuries results from the breach of some particular duty owing from the one to the injured party. In the complex relations of society the law recognizes two distinct duties distinguished by their origin; namely, contractual and legal, the one having its foundation in contract, the other existing independently of contract, and solely as a creature of the law. But a single act may, of course, result in a breach of both contractual and legal duty. If one has committed a breach of contract, he is liable to those only with whom he has contracted; and if one has committed a breach of legal duty, he will be liable for injury thereby to one to whom the duty was owing. But a single act may create a breach of legal, and of contractual, duty with another respecting the same matter (a.)

Negligence in the manufacture of harmless articles; Rule of non-liability.—It is the prevailing rule that a manufacturer is liable only to the immediate purchaser for the negligent and improper construction of an article not necessarily dangerous, or for an omission of duty not imminently hazardous to life. A manufacturer supplying an article not necessarily dangerous owes no duty to the public; his only duty is to the one with whom he contracts for the sale of his wares, as determined by the contract, expressed or implied. If the article sold is imperfect and results in injury to any one, the only duty violated is, as to the manufacturer, that imposed by the contract; and accordingly, only those sustaining injuries arising from defects in the manufactured article,

(a) *Thomas v. Winchester*, 6 N.Y. 397; *Norton v. Sewall*, 106 Mass. 143; *Peters v. Johnson*, 50 W. Va. 644, 41 S.E. Rep. 190, 67 L.R.A. 428; *Whit. Smith Neg.* 10.

who stand in contractual relations with the manufacturer, can recover from such manufacturer therefor (*b.*)

The leading case on this subject is the English one of *Winterbottom v. Wright*. (*c.*) There the plaintiff, a mail coachman, was injured by the breaking down of a mail coach that the defendant had contracted with the postmaster-general to provide and keep in repair for the carrying of the mail. The coachman was an employee of neither the post office department nor the defendant, but of another person who, also under contract with the postmaster-general, provided the horses and the coachman for conveying the coach. The plaintiff's injury was the result of the defendant's negligence in failing to keep the coach in proper repair. In holding that the plaintiff could not recover, Lord Abinger said: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the considerations of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Alderson, J., in giving his opinion to the same effect, said: "The contract in this case was made with the postmaster-general; and the case is just the same as if he had come to the defendant and ordered a carriage, and had handed it at once over to Atkinson. The only safe rule is to confine the right to recover to those who enter into a contract; if we go one step beyond that, there is no reason why we should not go fifty."

The case of *Collis v. Selden*, (*d.*), in which this question next arose, was an action by the plaintiff to recover from the defendant for injuries that he had received by the falling of a chandelier that the defendant had negligently and improperly hung in a public house. Following the *Winterbottom* case, it was held that the plaintiff could not recover; and the rule enunciated in these cases has been consistently adhered to in subsequent English cases (*e.*)

(*b.*) *Winterbottom v. Wright*, 10 M. & W. 109, and a number of U.S. decisions cited in Central L.J., p. 321.

(*c.*) *Winterbottom v. Wright*, 10 M. & W. 109.

(*d.*) *Collis v. Selden*, L.R. 3 C.P. 495.

(*e.*) *Heaven v. Pender*, 11 Q.B. Div. 503; *Francis v. Cockrell*, L.R. 5 Q.B. 501; *Blakemore v. Railway Co.*, 8 El. & Bl. 1035; *Longmeid v. Holliday*, 6 Exch. 761.

The American rule.—The courts of this country have quite universally adopted the principle of the English cases on this subject. The earliest exposition of this principle by the American courts appeared in the opinion of Strong, J., in the case of *Mayor, etc., of the City of Albany v. Cunliff* (f.) Without setting forth the facts, which are of some length, it was said: "The court below based the alleged responsibility of the defendants in this suit on the general ground that where one party sustains an injury by the misfeasance of another, the sufferer may maintain an action against the wrong-doer for redress. That rule operates where the injury is effected directly by the wrong, or where it results from the mal-construction of some object while it is in the possession or under the control or in any manner used under the agency or instructions of the party originally in fault. But I know of no case where it has been held that a stranger can recover for damages sustained by reason of the defective construction of an object of the builder, after the title to the object has changed, and it has passed out of his possession and is no longer subject to his control, and in no wise used pursuant to any authority or directions from him." The principle of this case has been re-affirmed in the later New York cases and followed by various other courts of the United States.

Illustrative cases.—Among the many cases illustrating this rule may be mentioned that of *McCaffrey v. Massburg, etc., Mfg. Co.* (h). There the plaintiff built a drop press in which was a heavy weight held by a hook. The hook, because of having been made of iron or steel of a poor quality, broke and let the weight fall upon and mash the hand of an employee of the purchaser of the machine from the manufacturer. The action for the injury thus sustained was brought by the employee against the manufacturer. The declaration averred the defendant's knowledge of the dangerous character of the appliance and that it was likely to endanger the life and limb of an operator exercising due care in the use of it. It was held, on demurrer to the declaration, that the plaintiff could not recover. *Braddon v. Perkins-Campbell Company* (i) was an action

(f) *Mayor, su. v. City of Albany v. Cunliff*, 2 N.Y. 166.

(h) *McCaffrey v. Massburg & Granville Mfg. Co.*, 33 R.I. 381, 50 Atl. Rep. 651, 55 L.R.A. 822.

(i) *Braddon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109, 58 U.S. App. 91, 30 C.C.A. 56, 47 Cent. L.J. 208.

ex delicto by the wife of the purchaser of a sidesaddle against the manufacturers to recover for injuries sustained by the wife by the breaking of the saddle. The substantial averment against the defendant was that it was the duty of the defendant to make and deliver to the purchaser, for the plaintiff's use, "a safe, sound, strong, and skillfully made saddle;" but that "the said defendant, disregarding its duty in the premises, negligently and unskillfully made, and delivered to said plaintiff, by the said husband, an unsafe, unsound, and weak saddle," by reason whereof the plaintiff sustained injury and was damaged. The court, by Dallas, circuit judge, held, after a careful review of the authorities, that the plaintiff was properly non-suited. The cause of *Curtin v. Somerset* (j) also may be referred to in this connection. That was an action by a guest at a hotel against the contractor and builder thereof. The building had been accepted by the owner but was so poorly constructed that, at an entertainment given at the hotel by the proprietor, a company of guests having gathered on the porch, a girder, which in some way supported it, gave way and the porch fell injuring the plaintiff. The court held the contractor owed no duty to the public or to the plaintiff but only to the one for whom he contracted to erect the building, and that the plaintiff could not, therefore, recover from the defendant for the injuries so received.

Negligence pertaining to articles imminently dangerous.—The law imposes upon every one the duty to the public to avoid acts in their nature dangerous to the lives of others; and so, the manufacturers and sellers of articles in their nature imminently dangerous are required to exercise proper care to render such articles reasonably safe for use, not only to the purchaser thereof, for, as to the purchaser, the duty is owing under the contract, but to all other persons who may come in contact with them, as a duty imposed by law and existing independently of contract. The act of negligence being imminently dangerous to the lives of others, the law creates the duty to the public, and the wrong-doer is therefore liable to any member of the public injured by defects in such articles resulting from the negligence of the manufacturer, even if there be no contractual relations between the parties. (k) As said

(j) *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. Rep. 244.

(k) *Parry v. Smith*, 4 C.P. Div. 325; *Landridge v. Levy*, 4 M. & W. 324; *Bank v. Ward*, 100 U.S. 204, 25 L. Ed. 621, and a number of U.S. decisions cited in Central L.J., p. 326.

in a recent, well considered case, the principle that governs this class of actions is, "that one who deals with an article imminently dangerous owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved." (1)

The New York case of *Thomas v. Winchester* (m) is a leading one on this subject. That was an action brought to recover damages from the defendant for negligently putting up, labelling and selling as the extra extract of dandelion, a simple and harmless medicine, a jar of the extract of belladonna, a deadly poison, by means of which the plaintiff to whom, being sick, a dose of the dandelion was prescribed by her physician, a portion of the contents of the jar was administered as the extract of dandelion, the poison resulting in great injury to the plaintiff.

The defendant, Winchester, had purchased the extract sold from another, which had been prepared and labeled by the agent of Winchester. Winchester had sold the extract to one Aspinwall, a druggist, who in turn sold it to one Foord, of whom the plaintiff's husband purchased the poisonous extract. In holding that the plaintiff could recover notwithstanding there was no privity or connection between the defendant and the plaintiff, the court, by Ruggles, C.J., said: "In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendee whose life was not endangered? The defendant's duty," continued the court, "arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened, could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in

(1) *McCaffrey v. Massburg & Granville Mfg. Co.*, 23 R.I. 381, 50 Atl. Rep. 651, 55 L.R.A. 822.

(m) *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455.

this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion by some person then unknown."

In the recent case of *Huset v. J. I. Case Threshing Machine Co.*,⁽ⁿ⁾ which leaves but little to be said on the subject, and which contains an admirable collection and review of the authorities, the plaintiff was an employee of an owner of a threshing machine manufactured by the defendant. The owner of the machine, bought it of another who purchased it directly from the defendant. The injuries, to recover for which the plaintiff sued, was sustained by him by falling through an insecure piece of sheet iron into a revolving cylinder. The machine as thus constructed was imminently and necessarily dangerous. The circuit court sustained a demurrer to the complaint containing these allegations. The Court of Appeals, in holding that the demurrer was erroneously sustained, Sanborn, Cir. J., speaking for the court, said: "Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made, that one who makes or sells a machine, a building, a tool or an article of merchandise, designated and fitted for a specific use, is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale."

Thus, this rule has been held to apply to an action against a builder of a scaffold for his negligence in its construction, whereby a servant of the one for whom it was built was injured by its falling (o); to an action against a refiner of oil below the legal fire

(n) *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. Rep. 865, 57 C.C.A. 237, 61 L.R.A. 303.

(c) *Devlin v. Smith*, 89 N.Y. 470; *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N.W. Rep. 418.

test, put upon the market for sale for illuminating purposes, by a purchaser from one to whom it was sold by the refiner, to recover for injuries which he sustained by an explosion thereof (*p*); and probably would apply to a caterer who dispenses unwholesome food to one not in contractual relations with him (*q*).

So, for the violation of a duty imposed by statute with reference to dangerous articles, there may be a recovery by any one injured because of a breach thereof, without fault on his part (*r*).

The Doctrine of implied invitation.—In many cases the courts have applied the doctrine of implied invitation to fasten upon the manufacturer a liability for injury to third persons resulting from defects in negligently manufactured articles (*s*). In the case of *Bright v. Barnett Record Co.*, a scaffold case,—an action against a contractor by a servant of one for whom the contractor built a scaffold in such a negligent manner as to cause it to fall and injure the servant, the court, in holding that the defendant could be held liable on the ground of an implied invitation, said: "The first position taken by the learned counsel of the appellant in their brief is that the appellant owed the deceased no legal duty arising from contract or otherwise. This is no doubt the general rule. 'The liability of the builder or manufacturer for such a defect is in general only to the person with whom he contracted.' But this case belongs with a class of cases that can be sustained outside of this general principle, and may rest on two well-established principles of law. The defendant, in furnishing this staging for the use of the employees of the fire extinguishing company, on which they might stand or walk in doing their work, had, in effect, invited and induced the deceased to walk on it while doing his work, and was liable to him if he suffered an injury from its defective condition, caused by the negligence of its construction. The case may rest on this simple implied invitation."

Fraud and bad faith.—In some cases the liability of the manufacturer or seller is put upon the ground of fraud and deceit

(*p*) *Elkins v. McKean*, 79 Pa. St. 493; *Wellington v. Oil Co.*, 104 Mass. 64.

(*q*) *Bishopp v. Weber*, 139 Mass. 411, 1 N.E. Rep. 154, 52 Am. Rep. 154.

(*r*) *Ives v. Welden*, 114 Ia. 576, 87 N.W. Rep. 408, 54 L.R.A. 854.

(*s*) *Heaven v. Pender*, L.R. 11 Q.B. Div. 503; *Pickard v. Smith*, 10 C.B. (N.S.) 470; *Mulchey v. Society*, 123 Mass. 487; *Gilbert v. Nagle*, 118 Mass. 278; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N.W. Rep. 418, 26 L.R.A. 524; *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387.

consisting in selling an article known to be dangerous, the defect in which is concealed. Conspicuous in this group of cases is the case of *Schubert v. J. R. Clark Co.* (1). The facts in that case, as stated by the court, are substantially as follows: The plaintiff, a house painter, was in the service of one Phelps. He was engaged in the work of painting the interior of a certain building. His employer, Phelps, as a purchaser, ordered from a retail merchant a new 10 foot stepladder, directing it to be delivered to the plaintiff at the place where he was at work. The merchant, not having such a ladder in his stock of goods, ordered the defendant corporation to deliver such a step-ladder to the plaintiff for his use. The defendant delivered a ladder to the plaintiff pursuant to that order. This we construe to have been a purchase by the merchant from the defendant. The defendant was a manufacturer of such goods and the ladder so delivered had therefore been manufactured by it, "to be sold for the purpose of being used." It was made of poor, cross-grained and decayed lumber, and "was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same." It was alleged that the defendant knew or ought to have known of such defects and insufficiency. Neither the plaintiff nor his employer nor the merchant from whom the latter ordered the ladder knew of such defects and it was so varnished, oiled and painted that they could not discover them. The plaintiff, supposing the ladder to have been made of good material, and of sufficient strength, proceeded to use it in the performance of his work and while standing on it, seven feet above the floor, it broke, without his fault, causing him to fall and he was thereby injured. The court, by Dickson, J., said: "If the defendant knowingly delivered such an article for the plaintiff's use, it was its duty to warn him of the danger by disclosing the hidden defects; and neglect of that duty would constitute actionable negligence. Every one may be supposed to understand that such articles are manufactured, sold or disposed of with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, would ordinarily assume, without inquiry, and without any express

(1) *Schubert v. J. R. Clarke Co.*, 49 Minn. 331, 51 N.W. Rep. 1103, 32 Am. St. Rep. 559, 15 L.R.A. 818.

warranty, that it was what it appears to be;—a thing intended for actual use; and that it has not been so negligently manufactured that by reason of concealed defects its use would be attended with danger of serious injury. And this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances silence would partake of the nature of an assurance that the thing had not any such known but concealed defects."

Lewis v. Terry (u) was an action brought by the guest of the purchaser of a folding bed, against the seller thereof, for injuries resulting from the negligent construction of the bed. The defects in the bed rendering it dangerous for use, and being known by the seller at the time of the sale, but undisclosed to the purchaser, it was held that there might be a recovery, the case apparently resting on the fraud of the seller.

Upon this ground, also, the plaintiff was held entitled to recover against a dealer selling a gun to the plaintiff's father, which, from defects therein, known to the dealer but undisclosed, exploded, resulting in injury to the plaintiff (v.)

Numerous other cases, English and American, have been put upon this ground,—of the fraud of the seller, which are cited in the note (w.)

It has been said that in this class of cases it is not necessary that the article in which the defect exists shall be "imminently dangerous," to fasten a liability upon the manufacturer. (x). It is necessary, however, it need hardly be said, that the manufacturer should have knowledge of the defect rendering dangerous the

(u) *Lewis v. Terry*, 111 Cal. 39, 43 Pac. Rep. 398, 52 Am. St. Rep. 146, 31 L.R.A. 220, 42 Cent. L.J. 264.

(v) *Landridge v. Leby*, 2 M. & W. 519, 4 M. & W. 337.

(w) *George v. Skivington*, L.R. 5 Ex. 1; *Longmeid v. Holliday*, 6 Exch. 761; See also *Heiser v. Kingsland, etc., Co.*, 110 Mo. 605, 19 S.W. Rep. 630, 15 L.R.A. 821; *Elkins v. McKean*, 79 Pa. St. 493; *Bank v. Ward*, 100 U.S. 195, 26 L. Ed. 112; *Bradgon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109, 58 U.S. App. 91, 30 C.C.A. 567.

(x) *Bradgon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109, 30 C.C.A. 567.

article sold, before the rule laid down can have any application. (y).

Conclusion.—We have studied the cases on this branch of the law with a view to deducing certain general rules on the subject and ascertaining the principle underlying the various decisions. We, however, are not so sanguine as to believe that perfect order has been wrought from such a chaotic mass of cases. The West Virginia court was not far from the truth when, to the question, "What is the test or criterion always applicable"? it answered, "Hardly any. Each case involving this nice principle must be largely its own arbiter."—*Central Law Journal*.

(y) *Heiser v. Kingsland & Douglas Mfg. Co.*, 110 Mo. 605, 19 S.W. Rep. 630, 33 Am. St. Rep. 482, 15 L.R.A. 821.

The arguments advanced in the United States in favour of limiting the right of appeal in criminal cases are not convincing. As to the contention that juries have a better opportunity to decide upon the credibility of the witnesses, it may be said that the truth that juries are the best judges of the facts is now sufficiently recognized by the judges who review cases on appeal. But every one knows that juries may come, and often do come, to erroneous conclusions, and it is but just that their verdicts should sometimes be set aside on the ground that they are contrary to, or unsupported by the evidence. Against the objection that a defendant who has the means to avail himself of an appeal may escape through technicalities, it may be answered that that is not a reason for taking away the right of appeal. It is rather a reason for amending the law with reference to the grounds upon which a new trial may be granted. There is a section in the New York Code of Criminal Procedure which provides as follows: "After hearing the appeal the court must give judgment without regard to technical errors, or defects, or to exceptions which do not affect the substantial rights of the parties." This might be improved upon by enumerating the technical errors which should be disregarded. The claim that the right of appeal gives a defendant of means an advantage over the poor defendant is undoubtedly well founded. It is most unfortunate, as are all the disadvantages of poverty.—*Law Notes*.

ENGLISH CASES.

LIBEL BY SERVANT OF CORPORATION — LIABILITY OF COMPANY FOR MALICIOUS LIBEL.

Citizens Life Assurance Company v. Brown (1904) A.C. 423, was an action against a limited company to recover damage for a malicious libel written and published by one of its officers. The defendants contended that malice could not be imputed to a corporation, relying on the dictum of the late Lord Bramwell in *Abrath v. North Eastern Ry. Co.* 11 App. Cas. 247, 250, but the Judicial Committee of the Privy Council (Lords Macnaghten, Davey and Lindley, and Sir A. Wilson) declined to adopt that view, and held, affirming the judgment of the court below, that although the servant may have had no actual authority, express or implied, to write the libel complained of, if he did it in the course of an authorized employment the corporation is liable.

FINAL JUDGMENT — APPEAL — OMISSION OF FACT IN PETITION FOR SPECIAL LEAVE TO APPEAL — COSTS.

McDonald v. Belcher (1904) A.C. 429, was an appeal from the Supreme Court of Canada. The action was brought by executors to recover monies due to their testator's estate. At the trial the judge gave judgment in favour of the plaintiffs for an item of their claim amounting to \$50,000, and directed a reference as to the other items, reserving costs. According to the Yukon Territorial Act, 1899, s. 8, it was necessary to bring an appeal from a final judgment within 20 days, and the Supreme Court of British Columbia held that as to the \$50,000 the judgment was final, and an appeal therefore failed because not brought within 20 days. The defendants then appealed to the Supreme Court of Canada, which court, without considering the question of jurisdiction to entertain the appeal, reversed the judgments of the lower courts and granted a new trial. From that order the plaintiffs applied to the Judicial Committee of the Privy Council for special leave to appeal, alleging that the construction of the Yukon Territorial Act was a matter of general public importance, but omitted to state, as the fact was, that the Act had been repealed. Leave was

granted, and this omission was urged as a reason for depriving the applicants of costs; but the Judicial Committee (The Lord Chancellor and the Lords Lindley and Kinross, and Sir A. Wilson) being of opinion that on the merits the appellants were entitled to succeed, on the ground that the judgment as to the \$50,000 was a "final judgment" from which, after the lapse of 20 days, no appeal lay either to the Supreme Court of British Columbia or to the Supreme Court of Canada, allowed the appeal with costs, notwithstanding the omission to state that the Act in question had been repealed, which in the circumstances was considered immaterial.

CONTRACT — PREVENTION OF PERFORMANCE OF CONTRACT — QUANTUM MERUIT.

Lodder v. Slowey (1904) A.C. 442, was an appeal from the Supreme Court of New Zealand. The defendants in the action had become sureties for the due performance of a contract for the building of a tunnel and other works by one, McWilliams, for a municipal corporation. McWilliams having made default and been dismissed from the work, the defendants employed Slowey to complete the job, and by arrangement with the defendants the corporation by its servants assumed the direction and control of the work by Slowey and ultimately, as the jury found, wrongfully took possession of the works and prevented Slowey from completing them. Slowey then sued the defendants on a quantum meruit for the work actually done by him. The New Zealand Court held he was entitled to recover and the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Lindley) affirmed the judgment.

PRACTICE—SPECIAL LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL—APPEAL TO SUPREME COURT OF CANADA — UNSUCCESSFUL APPELLANT TO SUPREME COURT.

In *Canadian Pacific Ry. v. Blain* (1904) A.C. 453, the Judicial Committee of the Privy Council (Lords Davey and Robertson, and Sir A. Wilson) once more reiterate the rule that in considering applications for leave to appeal by an appellant who has unsuccessfully appealed to the Supreme Court of Canada, the Committee will not grant the leave unless a question of law is raised of sufficient importance to justify it, wherever the applicant has elected to appeal to the Supreme Court, and not to His

Majesty in Council as he might have done. The question of the duty of a railway company to protect its passengers from assault was not considered to be a question of law of sufficient importance to warrant leave to appeal being given to a railway company seeking to deny that the law imposes such a duty on them.

ASSIGNMENT—CHOSE IN ACTION—NOTICE—MORTGAGE—ACKNOWLEDGMENT IN MORTGAGE OF RECEIPT—ASSIGNEE—JUD. ACT, s. 25, SUB-S. 6, (ONT. JUD. ACT, s. 58 (5)).

In *Bateman v. Hunt* (1904) 2 K.B. 530, the plaintiffs as assignees of a mortgage claimed to recover the amount acknowledged to have been received by the mortgagors in the body of the mortgage and also in a receipt endorsed thereon, and several objections were raised by the mortgagors to their right to recover. The mortgage was originally given under the following circumstances—viz, a solicitor was instructed by the defendants to procure a loan for them of a specified amount on the security of a mortgage. The mortgage deed was prepared and executed by the defendants purporting to be in consideration of the specified sum the receipt whereof was acknowledged in the body of the deed, and also in a receipt indorsed thereon. The solicitor himself advanced a sum of money, the amount of which was disputed, but the mortgage was made out in the name of a clerk in his office as mortgagee. The clerk subsequently assigned the mortgage to the solicitor, who afterwards assigned it by way of a sub-mortgage to the plaintiffs' testator. The solicitor and the plaintiffs' testator died without ever having given notice of the assignments to the defendants; but notice was given by the plaintiffs before action of both assignments. The defendants contended (1) that the plaintiffs were not entitled to sue in their own names, because the notice was insufficient under the Jud. Act, s. 25, sub-s. 6 (Ont. Jud. Act, s. 58 (5)). (2) That if entitled to sue they were bound by the equities between the defendants and the original mortgagor, and that the full amount purported to be secured had not in fact been advanced, and that was one of the equities to which the plaintiffs as assignees were subject. The judge at the trial (name not given) gave judgment in favour of the plaintiffs and the Court of Appeal (Collins, M.R., and Stirling and Matthew, L.JJ.) affirmed his decision, holding that the statute prescribes no limit of time within which notice is to be given, and that it is sufficient if given

before action ; and, also, that under *Bickerton v. Walker*, 31 Ch. D. 151, the assignees were entitled to rely on the acknowledgment in the deed and receipt endorsed ; that the full amount of principal secured had been advanced, and that the plaintiffs had the better equity.

MASTER AND SERVANT — NEGLIGENCE — MASTER — NURSING ASSOCIATION — CONTRACT TO SUPPLY NURSE — NEGLIGENCE OF NURSE.

Hall v Lees (1904) 2 K.B. 602, was an action by husband and wife against the committee of a Nurses' Association to recover damages occasioned to the wife by the negligence of a nurse supplied by the Association. The Association was formed for the purpose of providing for the supply of properly qualified nurses, to attend the sick in a certain neighbourhood. The Association, for that purpose appointed and paid salaries to nurses, for whose services they made charges to persons on whose application they were supplied. The regulations of the Association provided for a certain supervision over the nurses by a superintendent appointed by the Association ; but with regard to a nurse, when engaged in nursing a patient, they provided that while so engaged she should not absent herself from duty without the permission of the patient's friends, and that she should implicitly follow the instructions of the patient's doctor. A form was sent out by the Association to persons applying for a nurse, to the effect that while engaged in nursing the patient the nurse was to be regarded as employed by that person. Two nurses were supplied by the Association for the purpose of nursing the female plaintiff, and owing to the carelessness of one of them the female plaintiff, while under the influence of an anæsthetic, was injured by a hot water bottle. The trial took place before Jelf, J., and a jury. The jury found the injury was caused by the negligence of the nurses, or one of them, and that the Association had undertaken to nurse the female plaintiff through the agency of the nurses as their servants, and they assessed the damages at £300. The defendants contended that the second finding of the jury could not be supported on the evidence. The Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) agreed with that contention and set aside the verdict, and gave judgment dismissing the action holding that the contract between the plaintiff and the Association was a contract to supply a properly qualified nurse, but not a contract to nurse the female plaintiff.

**COMPANY—DEBENTURE—FLOATING SECURITY—EXECUTION AGAINST COMPANY
—PAYMENT TO SHERIFF TO AVOID SALE—MONEY IN SHERIFF'S HANDS.**

Robinson v. Burnell's V. B. Co. (1904) 2 K.B. 624, was an interpleader between a debenture holder whose debenture constituted a floating security on all the assets of a joint stock company, and an execution creditor of the company, as to the right to certain moneys in the hands of a sheriff under the following circumstances: The execution creditor had placed a fi. fa. against the company in the hands of the sheriff, and in order to prevent a sale thereunder the company arranged to pay and did pay to the sheriff daily a certain proportion of its daily takings: while this money was still in the hands of the sheriff, the debenture holder procured the appointment of a receiver and it was contended that the receiver was entitled to the money. Channell, J., held that the payments to the sheriff must be deemed to be payment to the execution creditor, and that the receiver was therefore not entitled to the money in question.

**ADMIRALTY—SALVAGE—TOWAGE CONTRACT BETWEEN OWNERS OF SALVING AND
SALVED VESSELS—MASTER AND CREW OF SALVING VESSEL.**

The Friesland (1904) P. 345, was a salvage action, the plaintiffs were the owners, master and crew of the Cruiser, and the defendants were the owners of the Friesland. The defendants were informed by telegraph that the Friesland was lying disabled off the coast of Ireland, and agreed with the owners of the Cruiser for the towage of the vessel to Liverpool on the usual towage terms, but before the owners of the Cruiser could instruct the master, and before the agreement for towage was made, the Cruiser had proceeded to the disabled vessel, and had commenced towing her to Liverpool. Under the circumstances, Jeune, P.P.D., held that though the owners of the Cruiser were bound by the towage agreement, her master and crew had acquired independent rights which must be dealt with on salvage terms.

**PRINCIPAL AND AGENT—POWER OF ATTORNEY—POWER OF SALE—PROPERTY
HELD IN MORTGAGE.**

In re Dowson & Jenkins (1904) 2 Ch. 219, was an application under the Vendors' and Purchasers' Act. The vendor was a mortgagee, and the sale had been made under a power of sale in the mortgage, and the question in dispute was as to the sufficiency of a power of attorney made by the mortgagee to enable the

attorney to carry out the sale. The mortgagee had given instructions to his solicitor to put the property up for sale by auction, but before the day fixed for the sale he had to leave England and executed the power of attorney. It contained extensive powers of management and power to ask, demand, sue for and recover all sums owing to the donor, and to give, sign and execute releases and other discharges for the same, and also power to sell any real or personal property belonging to him. The power, however, contained no reference to the mortgage or the power of sale or the impending sale thereunder. Kekewich, J., on construction of the whole of the power of attorney, came to the conclusion that it did not authorize a sale by the attorney of property held as mortgagee by the principal, and the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) agreed with him, on the ground that the mortgaged lands could not be said to be lands belonging to the principal.

STATUTE OF LIMITATIONS—PRINCIPAL AND AGENT—MONEYS REMITTED TO AGENT FOR SPECIAL PURPOSE AND NOT ACCOUNTED FOR—EXPRESS TRUST—FRAUD—ACTION FOR ACCOUNT—(R.S.O. c. 129, s. 32).

In *North American Timber Co. v. Watkins* (1904) 2 Ch. 233, the decision of Kekewich, J. (1904) 1 Ch. 242 (noted *ante* p. 307) has been affirmed by the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.). In 1883 money had been remitted by the plaintiffs to the defendant to buy lands. In 1901 the plaintiffs discovered for the first time that the defendant had charged the plaintiffs more for the lands, than he had actually paid. The action was for account and the defendant set up the Statute of Limitations as a bar. The Court of Appeal agreed that the defendant was an express trustee, and they also considered that he had been guilty of a fraud, and in either view the Statute of Limitations was no defence.

COMPANY—JOINT DEBENTURES ISSUED BY SEVERAL COMPANIES—JOINT AND SEVERAL COVENANT—CHARGE OF JOINT DEBENTURES ON COMPANIES' UNDERTAKINGS.

In *re Johnston Patents Co.* (1904) 2 Ch. 234, three joint stock companies issued joint debentures which they jointly and severally covenanted to pay, and which they respectively charged on their several undertakings and assets. Each of the companies received a part of the proceeds of the debentures. Byrne, J., was

of opinion that the debentures were wholly ultra vires and null and void, but the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) came to the conclusion that they were not wholly void, but were valid and binding on the several companies to the extent to which the money advanced on them had come to the hands of each company. The articles of association empowered the directors to borrow any sum of money not exceeding the amount of the preference share capital of the company. No preference share capital had in fact been issued, and the Court of Appeal held that this clause did not limit the amount that could be borrowed.

BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—CERTIFICATE NOT TO BE CONCLUSIVE AS TO SUFFICIENCY OF WORK OR MATERIALS—DEFECTIVE WORK—MATERIALS—DAMAGES.

Robins v. Goddard (1904) 2 Ch. 261, was an action brought by builders under a building contract clause 16 of which empowered the architect to order in writing from time to time the removal of improper materials, the substitution of proper materials, and the removal and proper re-execution of any work not in accordance with the drawings and specifications. Clause 17 provided that any defect which might appear within twelve months from the completion of the work arising, in the opinion of the architect, from materials or workmanship not in accordance with the drawings and specifications should, upon the written direction of the architect, be made good by the contractor at his own cost, unless the architect should decide that he ought to be paid for the same. Clause 30 provided for payment of the contractor under progress certificates, to be issued by the architect, and contained the proviso: "No certificate shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects, as provided by this contract." The architect had issued certificates for the sum claimed by the plaintiffs, and had made no order or direction under clauses 16 and 17. The defendant, nevertheless, claimed that he was entitled to set off damages he had sustained by reason of defective work and materials, and that the architect's certificates were not conclusive. Farwell, J., however, held that in the absence of any order or direction by the architect under clauses 16 and 17 the architect's certificates were conclusive, and that the defendant was not entitled to set off the damages he claimed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ontario.] LAKE ERIE & DETROIT RIVER R.W. CO. *v.* MARSH. [Oct. 22.
Appeal—Special leave.

Special leave to appeal from a judgment of the Court of Appeal for Ontario, 60 & 61 Vict. c. 34, s. 1 (E.), may be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. If a case is of great public interest, and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. Leave refused.

Riddell, K.C., for appellants. *Faulds*, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

MacMahon, J.] JOHN INGLIS CO. *v.* CITY OF TORONTO. [Oct. 22.
Municipal corporation—By-law closing street—Motion to quash—Consent of Dominion Government—Amending by-law.

The Municipal Act, 3 Ed. VII., c. 19, s. 628, provides that without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid shall be void unless it recites such consent. On Sept. 26th, 1904, the Municipal Council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan Avenue in that city. It was afterwards discovered that Strachan Avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordnance Survey, and the consent of the Dominion Government was sought and given by Order-in-Council of Oct. 6th, 1904. On

Oct. 10th, 1904, the City Council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served Oct. 1st, 1904, before the passing of the amending by-law.

Held, that when by-law 4420 was passed, the powers of the city council were spent, and as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid.

H. S. Oster, K.C., for the motion. *Watson*, K.C., and *Fullerton*, K.C., contra.

Trial—MacMahon, J.] *PINKE v. BARNHOLD* [Oct. 22.
Church membership—Expulsion of member—Domestic tribunal—Injunction—Civil Courts.

The plaintiff sought an injunction restraining the trustees of St. Peter's Church in Berlin proceeding with a resolution, passed by them, expelling him as a member of the church on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion.

Held, that the civil courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his membership, investigate the legality or regularity of the proceedings, and the motion must be dismissed.

Clement, K.C. for plaintiff. *Millar*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Perdue, J.] *BANNATYNE v. SUBURBAN RAPID TRANSIT CO.* [Sept. 12.

Trees on highways—Municipal Act—Railway Company cutting down trees on part of highway needed for its track—Injunction—Compensation to owner of adjoining land.

Motion to continue until the trial an interim injunction preventing the defendants from cutting down and removing shade and ornamental trees growing on the side of the highway adjacent to the plaintiffs' land.

The defendants' Act of incorporation empowering them to construct with the consent of the municipality their line of railway along the public

highway therein according to the plans to be approved by the council. The Act further provided that the several clauses of the Manitoba Railway Act, R.S.M. 1902, c. 145, should be incorporated with and deemed part of the Company's Act of incorporation.

By the plan of the roadway approved by the council, the centre line of the Company's Railway was to be twenty feet from the boundary of the highway in front of the plaintiffs' land.

Defendants cut down some of the trees there and were proceeding to cut down and remove the remainder when the injunction was obtained; claiming that, under their Act of incorporation and their agreement with the municipality which had been ratified by the Legislature, they had an absolute right to cut the trees down and build their tracks according to the said plan without making any compensation to the plaintiffs.

Sec. 688 of The Municipal Act, R.S.M. 1902, c. 116, provides as follows:—"Every shade tree, shrub and sapling now growing on either side of any highway or road in this Province shall be deemed to be the property of the owner of the land adjacent to such highway or road opposite which such tree, shrub or sapling is; and the owner of such land shall be allowed to fence in such trees for a space not exceeding eight feet from his boundary line." Under this section the plaintiff claimed the trees in question and the right to fence in eight feet of the highway adjoining their land, and notified the Company of their intention to fence in the eight feet accordingly.

Held, following *Douglas v. Fox*, 31 U.C.C.P. 140, that the plaintiffs had such an interest in the trees in question and in the eight feet of the highway as would entitle them to maintain an action to prevent destruction of the trees and encroachment upon the eight feet strip by any unauthorized person; and that the Legislature, in conferring upon the Company its powers as to the construction and working of its railway, had not deprived the plaintiffs of their right to compensation under s. 7 and other provisions of the Railway Act.

Where a statutory right has been conferred, the Legislature will not be deemed to have taken away that right by a later statute unless the plain language of the statute shews an intention to do so: *Re Cuno*, 43 Ch.D. 12.

While permitting to the Railway Company the full exercise of the special powers granted to it, the Legislature has protected the plaintiffs' rights by providing that compensation shall be made not only for land taken but also for lands injuriously affected by the construction and operation of the railway: *Parkdale v. West*, 12 A.C. 602; *North Shore Railway Co. v. Peon*, 14 A.C. 612; and other cases.

A railway company is bound under the statutes to take the necessary steps to settle the amount of the compensation to be paid to an owner whose land will be injuriously affected by the construction of the proposed work, and to pay the same, before the land is taken or the right interfered with: *Hendry v. Toronto H. & B. Ry.* 27 O.R. 46; subject, however, to the power conferred upon a Judge of the Court, by s. 25 of the Manitoba Railway Act, to order that immediate possession be given to the Company upon proof that such is necessary to carry on the railway work, and upon the Company furnishing proper security for payment of the compensation to be awarded.

Order that injunction be continued until the trial of the action, but to be dissolved upon the Company giving security to the satisfaction of the judge that it would forthwith proceed under the statutes to settle the amount of the compensation to be awarded to the plaintiffs for the injuries complained of; and for any other injuries to the plaintiffs' land which would be occasioned by the construction and operation of the proposed line of railway. Costs reserved.

O'Connor, for the plaintiffs. *Munson*, K.C., for defendants.

Richards, J.] *GARDANIEK v. CANADIAN NORTHERN R.W. CO.* [Sept 29. *Practice—Examination for discovery—King's Bench Act, Rule 387—Officer of company—Conductor of railway train, when he may be examined as an officer.*

Motion to compel the conductor of one of the defendants' trains to attend and be examined, under Rule 387 of the King's Bench Act, for discovery as to the plaintiff's claim in this action, which was for injuries received by him while acting as brakeman on the train. It appeared that the plaintiff went under one of the cars by order of the conductor in charge of the train for the purpose of adjusting some chains, and that, while he was so engaged, the train was started without warning to him and caused the injury complained of.

Held, that the conductor, under the circumstances, was an officer of the railway company within the meaning of the Rule, and must attend and submit to be examined as to his knowledge of the matter in question: *Moxley v. Canada Atlantic Ry. Co.*, 15 S.C.R. 145; *Leitch v. G.T.R. Co.*, 13 Pr. 369, and *Dixon v. Winnipeg*, 10 M.R. 663, followed.

Potts, for plaintiff. *Laird*, for defendants.

UNITED STATES DECISIONS.

PARENT AND CHILD:—A child is held *McKelvey v. McKelvey* (Tenn.) 64 L.R.A. 991, to have no right of action to recover damages against his father and stepmother for cruel and inhuman treatment inflicted upon him by the latter with consent of the former.

RAILROADS:—The right of a railroad company to give one teamster an exclusive right to enter upon the railroad property to solicit the privilege of carrying the baggage of passengers, and to exclude others from its grounds, is sustained in *Hedding v. Gallagher* (N.H.) 64 L.R.A. 811, where the reasonable requirements of passengers are thereby fully met.

TREES:—The owner of trees in a highway is held, in *Haslehurst v. Mayes* (Miss.) 64 L.R.A. 805, to have no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality, which has full authority to establish the same, and full jurisdiction over the highway within its limits.

SUNDAY: The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is held, in *State v. Collett* (Ark.) 64 L.R.A. 204, to be within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late to repair it on Saturday with the appliances at hand, and the owner of the mill was not negligent in not having foreseen the accident or having appliances at hand to repair it immediately.

CARRIERS—INJURIES TO PASSENGERS BY CARS PASSING EACH OTHER TOO CLOSELY.—We desire to call attention to a valuable opinion by Judge Goode of the St. Louis Court of Appeals in the case of *Kreimelmann v. Jourdan*, 80 S.W. Rep 323. In this case a street railway company ran open summer cars, with a continuous footboard on each side, on double tracks so close together that passengers using the inside footboard would be struck by cars going in the opposite direction. Plaintiff in this case was so struck and injured while he was passing from the rear of the car, along such footboard, to a seat, without knowledge that the tracks were so close together as to render his position dangerous. The court held that he was not guilty of contributory negligence as a matter of law, though he was well acquainted with the operation of street cars, defendant having taken no precautions to prevent such use of the inside footboard by passengers.

Judge Goode, in the course of a very valuable opinion, said in part: "The proposition is greatly insisted on that the court erred in refusing to instruct that the plaintiff could not recover if he stepped on the footboard without first looking for a car on the north track. The rule that a person must look or listen before going on a given spot, or forfeit any relief for an injury received thereon, prevails when the spot is known to be in the track or course habitually passed over by trains, cars, waggons, or other instru-

mentalities whose impact will inflict injury. We are not sure a jury must be told a plaintiff cannot recover for a personal injury if he did not look around before going where he was hurt, except when the accident occurred while the plaintiff was crossing a railway track, which is a warning of danger to a person about to cross it. When a man steps on a railway track, he knows he is going where danger lurks, and knows, too, whence the danger is to be apprehended; that is from the approach along the track of an engine or car. Hence the propriety and the wisdom of requiring him to look in advance to see if the track is clear, or requiring that specific act as a discharge of the duty to use ordinary care. A person crossing a railway track at a common highway crossing has no reason to rely on the railway company's having arranged the operation of trains to insure his safety, and hence must look for trains. But under circumstances which give him the right to trust to the railway company's care, the rule in regard to looking for trains before crossing a track does not prevail: *Terry v. Jewett*, 78 N.Y. 338; *Warren v. Ry.*, 8 Allen, 227, 85 Am. Dec. 700; *Klein v. Jewett*, 26 N.J. Eq. 474; *Jewett v. Klein*, 27 N.J. Eq. 550. The footboard on which the plaintiff stepped was intended, among other things, for passengers to walk to a seat on. In itself, it gave no warning that a person using it was likely to be hit by a car on the near track, but tended to produce an impression that he would be safe on the board, for it was not to be supposed the defendant would invite its patrons to expose themselves to great peril. Nor was the north track a warning to him, for he might believe, with reason, that a passing car would miss him; and, if he told the truth, that was his belief. We do not feel justified in prescribing as the measure or quantum of care to be used by a passenger in such a situation that he must look for approaching cars before stepping on a footboard. The more satisfactory test of right conduct under the circumstances that surrounded the plaintiff is the one which prevails universally, namely, did he exercise ordinary care to insure his own safety? The facts did not call for a charge to the jury that plaintiff was bound to look for another car before he stepped on the board, though failure to take that precaution would defeat his action if the jury thought it was an essential element of due care."

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All good and true men who speak the English tongue will rejoice at the news that a treaty of arbitration is again being formulated between Great Britain and the United States. Let us hope that this time the federal senate will forget its obduracy, born of international narrow-mindedness, and advance the outposts of civilization many a league toward the millennium by ratifying the treaty. We are quite sensible of the fact that a treaty of arbitration does not mean an alliance between the two powers signatory; but who shall say that it does not make for that desideratum to a prodigious degree? On Christmas eve, 1874, the late Joseph Cook, speaking in Tremont Temple, said: "In the possible, I do not say in the probable, future, there lies at a distance of not more than three centuries, an alliance, not a union, of Great Britain, United States, Australia, India, belting the globe and possessed of power to strike a universal peace through half the continents and all the seas." If he had spoken in the altered condition of things to-day between the two great bodies of the Anglo-Saxon race, British and American, he might have reduced the period of the consummation of his prophecy to fifty years.

Apropos of the above, we are forced to say, with regret, that "international narrow-mindedness" does not find its sole exponent in the United States Senate. There are certain English publicists writing in the reviews and other great organs of thought in Europe who seem to be determinedly doing their worst to retard the progress of arbitration. Take an instance at random. In the "Empire Review" for October last, Mr. Edward Dicey, C.B., rudely speaks of International Law as being a "delusion" so far as it possesses any binding authority. (We might ask him, parenthetically, if "public opinion" is not the ultimate sanction of International Law as it is of any code of municipal or civil law?) Then he says: "The whole theory that war might be avoided by arbitration seems to me to be based upon a fundamental misconception of human nature." (Again, parenthetically, we might observe that Aristotle's clanless outlaw might have enunciated a similar opinion about the judicial arbitrament of disputes between

man and man.) But let us quote Mr. Dicey for the last time here. "I read the other day in a leading American newspaper a statement to the effect that if the Governments of the United States and Great Britain would only issue a solemn protest against the awful butchery occasioned by the Russo-Japanese conflict in Manchuria, the public opinion of the civilized world would compel the belligerents to lay down their arms. More arrant nonsense was never written, even in the columns of the trans-Atlantic press." Contrasting these expressions with the lofty sentiments of Joseph Cook we ought to consign Mr. Edward Dicey, C.B., to the limbo of the forgotten before we censure our American cousins for not furthering an Anglo-Saxon alliance, or being careless in their speech about it.

We are not aware that there has as yet been in this country occasion for any discussion as to the forgery of type-writing, but it may arise at any moment. The subject is discussed in a recent number of the *Law Notes*. As said by the writer, it would hardly occur to any one who had not considered the matter that among the advantages of a type-written document over one in manuscript might be numbered the difficulty with which a successful forgery of the former could be accomplished. In fact, most people entertain the contrary view. A critical examination, however, would seem to indicate that every type-writing machine is possessed of a strange individuality; and that type-writing is, of all kinds of writing or printing, the least susceptible of imitation. We have not space to go into the details that lead to this conclusion; those interested in the subject can work it out for themselves. There is one case of an attempt to forge type-writing which has come before the Courts in the United States: *Levy v. Rust*, 49 Atl. Rep. 1017. The defendant was an attorney who was in the habit of having receipts for money paid him made out in type-writing in his office, and then personally affixing his signature thereto. Some of these being produced in Court they were promptly repudiated by him as forgeries. The judge before whom the case was tried carefully examined these documents with an expert, and they came to the conclusion that the receipts never were made in Mr. Rust's office, the mechanical work forbidding such a conclusion. There was also further evidence in that direction owing to the quality of the

paper that was used. An expert in hand-writing was unable to discover anything in the signatures which would lead to a conclusion that they were forged, but the expert in type-writing made the forgery of the type-writing clear to the judge. The conclusion seems reasonable that type-writing as compared with hand-writing is not easily forged, and this is a matter of some practical interest in every solicitor's office.

The extraordinary value of "Chinese Made Easy" to lawyers at nisi prius, and in the inferior courts of criminal jurisdiction, induces us to depart from our usual practice and notice it in our editorial columns. The book is written by Walter Brooks Brouner, A. B., M. D., (Columbia) and Fung Yuet Mow, Chinese Missionary in New York City, and is a royal road to the mysteries of the Chinese language as the same is spoken in the laundries, restaurants opium-joints, and other strictly mundane places where celestials are wont to foregather on this continent. As we all know some very pretty quarrels are apt to ensue at times between these expatriated citizens of the heavenly kingdom; and as the essence of these quarrels is reasonably certain to be distilled in court, a speaking acquaintance with the Chinese tongue is an obvious advantage to members of our profession. To attempt to acquire a knowledge of literary Chinese is enough to convince one that the "yeilow peril" doesn't depend for its existence upon yellow journalism alone. Such an exploit proves a very "parlous thing" indeed. But, as Professor Giles in his "China and the Chinese" points out, Chinese embraces two languages, one written, the other colloquial, the latter being comparatively easy of acquirement. In the opinion of this learned authority "a student will begin to speak from the very first, for the simple reason that there is no other way. There are no declensions or conjugations to be learned, and, consequently, no paradigms or irregular verbs. In a day or two the student should be able to say a few simple things, after three months he should be able to deal with the ordinary requirements, and after six months he should be able to chatter away more or less accurately on a variety of interesting subjects." Professor Giles has written an introduction to Messieurs Brouner and Fung's book, in which he strongly commends its value for imparting a speedy knowledge of colloquial Chinese. It is not possible

to institute a comparison between this and any other similar work, because it is a pioneer in the field and has no rival. As to Dr. Brouner's qualifications for the authorship of such a work, it will be noted that he is a graduate (in Arts and Medicine) of Columbia University, and it may be added that he has had exceptional facilities for studying the Chinese tongue because of his holding a position for some time on the medical staff of the department charged with overseeing Chinese emigration at the port of New York. It is unnecessary to say anything of his collaborator's qualifications. When one of the Chinese race attempts to do anything he does it well, and largely because he does it to the extent of his skill and ability. Such a work will be a helpful addition to the general library of the legal practitioner in Canada.

***THE EFFECT OF LETTERS OF ADMINISTRATION
OBTAINED PENDENTE LITE.***

The question of the relation back of letters of administration obtained *pendente lite* has been recently under the consideration of the court on three or four occasions, and has resulted in the expression of some diversity of opinion by members of the Bench.

It is well known that prior to the Judicature Act there were different rules prevailing in courts of law and equity on this subject. At law as in equity an executor might commence an action or suit before obtaining probate, and if he obtained probate before the trial or hearing of the case that was sufficient to entitle him to maintain the action as executor, and the reason assigned for this rule was that he derived his authority not from the letters probate but from the will. On the other hand a different rule prevailed as regards administrators, and at law their authority was considered to be derived from the grant of letters of administration, and they were considered to have no *locus standi* to commence an action in respect of the estate of the deceased until they had first clothed themselves with the legal status of administrator of the estate; but in Equity a different rule prevailed and, as in the case of an executor, it sufficed if the plaintiff claiming to be administrator armed himself with the necessary authority at any time before the cause was heard.

After the passing of the Judicature Act it was held that the rule of equity on this point was now the law of the High Court in all cases, that Act having provided that where there was any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity should prevail (see Ont. Jud. Act, s. 58 (13)). Accordingly in *Trice v. Robinson*, 16 Ont. 433, it was held that letters of administration obtained pendente lite related back to the death of the deceased, and that it was sufficient if a person suing as administrator obtained a grant of letters of administration at any time before trial. The rule thus laid down seemed simple enough, but like many other rules laid down by judicial decisions it is no sooner laid down than a process of frittering it away begins, and the same judge who decided *Trice v. Robinson*, held in *Chard v. Rae*, 18 Ont. 371, that notwithstanding letters of administration related back to the death of the intestate, yet an action commenced by a person who had not already obtained letters of administration would not stop the running of the Statute of Limitations in favour of the defendant until the plaintiff actually obtained them, and that the claim might thus be barred pendente lite, although the action was commenced before the statute had barred the claim. When one reads the facts of that case one is almost tempted to surmise that it is an instance of "a hard case making bad law."

Thus though the letters related back to the death of the intestate they nevertheless were not for all purposes sufficient to validate the plaintiff's status at the beginning of the action. The result of the decision was to create an anomalous condition of affairs: for some purposes the letters related back, and for others they did not, a plaintiff obtaining letters pendente lite was qualified to sue as administrator, and he was not; his action was commenced with sufficient authority, and it was not. The decision, in fact, seems to involve contradictory propositions which it is difficult to reconcile with sound reason. Even at law letters of administration whenever obtained were held to relate back to the death of the deceased. In *Foster v. Bates*, 12 M. & W. 226, it is said that "the title of an administrator though it does not exist until the grant of administration relates back to the time of the death of an intestate, and that he may recover against a wrong-

doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover." In fact at law he represented the deceased as from the day of his death, notwithstanding there might have been a prolonged interval between the death and the grant of administration. This being so, the common law rule which denied the relation back of letters obtained pendente lite seems to have been somewhat inconsistent. In *Doyle v. Diamond Flint Glass Co.*, 7 O.L.R. 747, an action under the Fatal Accidents Act, Idington, J., held that the rule laid down in *Trice v. Robinson* did not apply to causes of action vested in the administrator qua administrator, but which did not constitute any part of the deceased person's estate. He says "the doctrine of relation back to the death of the intestate is applicable to what concerns his estate and the transmission thereof. That is not the case here. The rights sought to be enforced here never were the rights of the deceased. They formed no part of his property or estate. They are the creation of statutes that gave them directly to the widow and the mother under such circumstances as have arisen here. The duty is cast on the administrator to bring for them the action. It might well have been provided by the statute that any other officer as trustee should do so. The right and the duty thus created have nothing to do with the estate of the deceased." Moreover in that case the learned judge further held that the doctrine of relation back could not be invoked by the plaintiff in that case, because in his view he was not rightfully entitled to the grant of administration.

Trice v. Robinson, supra, was an action brought under the Liquor License Act for supplying the deceased with drink while in a state of intoxication, but the learned judge points out that the damages recovered under that Act form part of the deceased person's estate, but it may be doubted whether the mere fact of the statutory destination of the damages recoverable in either case ought to make any difference. It is to the personal representative of the deceased in both cases that the right of action is given, and it seems to be introducing a needless and unjustifiable exception into the general rule laid down in *Trice v. Robinson* to say that in such cases the doctrine of the relation back of letters obtained pendente lite does not apply.

The material question in such an action is whether or not a duly appointed personal representative is before the Court, and

this fact ought to be conclusively determined by the grant so long as it remains unrevoked ; and it seems to be contrary to sound principle to go behind the grant and inquire into the right of the de facto administrator to obtain the grant. But the reasoning of Idington, J., would equally exclude the doctrine of relation back in favour of a person entitled to obtain a grant of administration, but not obtaining it until after suit, so far as an action under the Fatal Accidents Act is concerned.

Doyle v. Flint Glass Co. was subsequently appealed to the Divisional Court, and that Court, while reversing the judgment of Idington, J., did not in terms overrule his decision that the doctrine of relation back did not apply, but directed the issue, whether or not the plaintiff was in fact the widow of the deceased to be tried, which, if found in her favour, it was said would validate the proceedings ab initio, and if found against her would result in the dismissal of the action altogether apart from the question of relation back of the grant of administration. But as we have already pointed out, according to the reasoning of Idington, J., the letters obtained pendente lite could not relate back in favour of the plaintiff in this case even if she were rightfully entitled to them.

In *Dini v. Fauquier*, not yet reported, the precise point in question in *Doyle v. Flint Glass Co.* was again under consideration of the Divisional Court (Falconbridge, C.J.K.B., and Street and Britton, JJ.). In that case Idington, J., following his previous ruling in the *Doyle* case, dismissed the action. But there was the further circumstance in the *Dini* case, that the plaintiff had before action applied for the grant and had obtained an order therefor, though the letters were not actually issued until after the action had commenced. In that case the Divisional Court considered that the distinction which Idington, J., had drawn as to the rights of an administrator suing under the Fatal Accidents Act was not well founded, and reversed his decision, both on the ground that the letters related back to the commencement of the action, and also on the ground that there had been an actual adjudication of the plaintiff's right to the grant before action. The result of this decision is, we take it, not only to overrule *Doyle v. Flint Glass Co.*, 7 O.L.R. 747, but also *Chard v. Rae*, 18 Ont. 371 ; because in the *Dini* case also the question of the running of a Statute of Limitations was involved, and the action would have been too late unless the letters related back to the commencement

of the action ; and the rule may therefore now be taken to be that letters of administration obtained pendente lite, and before trial, relate back and are sufficient to support the claim of a plaintiff to the status of administrator for the purposes of the action. That is an intelligible rule, and it is to be hoped it may escape being frittered away by judicial refinements and exceptions.

RAILROADS—FAILURE TO LOOK AND LISTEN RULE.

An interesting contribution to the proper determination of the "look and listen rule" is to be found in the recent case of *Garlick v. Northern Pacific Railway Company*, 131 Fed. Rep. 837. In this case, plaintiff, without occasion therefor, was walking near a city station in the space between railroad tracks and a river bank, used as a pathway, and ranging in width from 5 to 25 feet. A freight train was moving in the opposite direction on the second track from him, making the usual noise ; and, after looking back along the nearest track, which could be seen for about 500 feet, and seeing no train thereon, plaintiff walked on about 150 feet, without again looking back, when he was struck and injured by the end of the pilot beam on the engine of one of defendant's trains which came from behind him. The space between the track and the river bank was there 11 feet wide, and plaintiff was walking at a safe distance from the track until just before he was struck, when he made a side step toward the track. The court held that, without regard to the question of defendant's negligence, plaintiff was guilty of such contributory negligence as precluded his recovery for the injury as a matter of law.

The court in the course of an interesting opinion, said : " The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice ; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of due care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary, reasonable care calls for proportionally increased vigilance : *Blount v. Grand Trunk Ry. Co.*, 61 Fed. Rep. 375, 9 C. C. A. 526 ; *Pyle v. Clark*, 79 Fed. Rep.

744, 25 C. C. A. 190; *C., St. P., M. & O. Ry. Co. v. Rossow*, 117 Fed. Rep. 491, 54 C. C. A. 313; *C. & N. W. Ry. Co. v. Andrews*, C. C. A., 130 Fed. Rep. 65. The three cases last cited were decided by this court, and pages of citations of cases from this court and all the courts of the country to the same effect might be added. In this case, if the path between the railroad tracks and the river was a dangerous place, the danger was obvious, and the risk was voluntarily and needlessly assumed by plaintiff, who went there for an idle stroll. When, after turning in his walk, he looked back along the nearest track, his view of it extended but a short distance, when it was cut off by a curve and obstructions. Yet, without looking again, or bestowing further attention to the situation, he walked along at an ordinary gait about 50 paces, or 150 feet; and, though the path was there 11 feet wide, just as the engine was nearly opposite him, he blundered, and came by a side step, from a safe distance away, so close to the track that he was immediately struck by the end of the pilot beam. That he was grossly negligent, and that his negligence was a proximate cause of his injury, is manifest.

Since the argument counsel have called our attention to the decision by the Supreme Court of Iowa of the case of *Camp v. Chicago Great Western Ry. Co.* (recently filed), 99 N. W. Rep. 735. An employee of the company after clearing snow from a switch in the company's Marshalltown yard, started along the track to a toolhouse 182 feet distant; having looked back along the track without seeing any engine. When within 25 feet of the toolhouse, and walking on the ends of the ties he was struck by an engine which came up on the track behind him faster than 6 miles an hour, which is the limit of speed fixed by a Marshalltown ordinance. Though the switchman had taken no other precaution, the conclusion was arrived at that he would have reached the toolhouse before being so overtaken had the engine not exceeded 6 miles an hour. The Iowa court held that the switchman had the right to rely confidently on the belief that no engine would be run on that track faster than the Marshalltown ordinance prescribed, and that reasonable care did not require that he should again look back, or walk beyond the reach of passing engines. We do not find this decision persuasive, or in harmony with the settled law on the subject. Such ordinances are intended to prevent collisions and accidents in urban communities. The limit of speed fixed is a

designation by the municipal council of the degree of care which shall be exercised in the operation of railroads within the municipality. To exceed the rate of speed so fixed as proper and safe may be some evidence of negligence; but, as between the railroad company and a person injured or put in danger, it is unlawful only in the sense in which any act of negligence which injures or endangers another is unlawful. And the doctrine of contributory negligence is just as applicable to cases of negligence in respect to ordained rates of speed as to any other species of negligence chargeable to a railroad company. In *Pyle v. Clark*, decided by this court, and already cited, the opinion states that the train which struck the plaintiff's team was running at about 15 miles an hour, in violation of a municipal ordinance which prohibited a speed of more than 8 miles an hour, yet the plaintiff was held guilty of contributory negligence, because, after looking along the track, he allowed a full minute to elapse before driving upon the track without again looking. And in *Blount v. Grand Trunk Ry. Co.*, also above cited, gates at the crossing were established by law to warn travellers, but it was held that the fact that the gates were open when a train was approaching did not excuse a person crossing the tracks for failing to look and listen. The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains.

The only other case which we find that seems to hold that running faster than the rate of speed allowed by a municipal ordinance has any bearing upon the matter of contributory negligence is the case of *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. Rep. 577, where damages were recovered for running over and killing a dog by defendant's trolley car running 20 miles an hour, in violation of a city ordinance limiting the speed to 10 miles. The court conceded that ordinarily the motor-man need not stop for dogs, who should care for themselves, and get out of the way of the car, yet held that the jury might properly determine whether, but for this improper rate of speed, in violation of the ordinance, the dog would not in that instance probably have escaped. Without further comment on these cases, it is sufficient to say that we adhere to the prior decisions of this court."—*Central Law Journal*.

ENGLISH CASES.

**EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.**

(Registered in accordance with the Copyright Act.)

PRACTICE—WRIT OF SUMMONS—SERVICE OUT OF JURISDICTION—CONTRACT
“WHICH ACCORDING TO THE TERMS THEREOF OUGHT TO BE PERFORMED
WITHIN THE JURISDICTION”—PLACE OF PAYMENT—RULE 64 (E)—(ONT.
RULE 162 (E)).

Duval v. Gans (1904) 2 K.B. 685, was an action brought against the defendants out of the jurisdiction or a contract for the price of goods sold in England to the defendants, who resided out of the jurisdiction. The contract of sale did not state in terms where payment was to be made. The defendants applied to set aside the writ of summons on the ground that the contract was not one “according to its terms” to be performed within the jurisdiction. Bucknill J., refused the motion and the Court of Appeal (Stirling and Matthew, L.JJ.) affirmed his decision on the ground that the meaning of the Rule 64 (e), (Ont. Rule 162 (e)) was not that it must be expressly mentioned in the contract that it was to be performed in England, but that it was sufficient if it appeared from the contract that that was the legal intentment of the parties; and further, that it was not necessary that the whole contract should be performable in England, but it sufficed if some substantial part of it was to be so performed. Following *Reynolds v. Coleman*, 26 Ch. D. 453, and *Rein v. Stein* (1892) 1 Q.B. 753, they held that it was a necessary implication that the payment under the contract in question was to be made in England, and therefore the service of the writ of summons out of the jurisdiction was properly allowed.

TRADE-MARK—“FRANCHISE.”

Bow v. Hart (1904) 2 K.B. 693, though dealing with other matters concerning the jurisdiction of County Courts, not necessary to be here considered, may be noted for the fact that Kennedy, J., decided that a trade-mark is not a “franchise.”

COMPANY—SHARE CERTIFICATE—SEAL OF COMPANY—FORGERY OF DIRECTORS' SIGNATURES—PRINCIPAL AND AGENT—SCOPE OF EMPLOYMENT.

In *Ruben v. Great Fingall Consolidated* (1904) 2 K.B. 712, the Court of Appeal (Collins, M.R., and Stirling and Matthew, L.JJ.) have found it necessary to reverse the decision of Kennedy, J. (1904) 1 K.B. 650 (noted ante p. 452), from which, as was anticipated, an appeal was had. It may be remembered that the plaintiffs had advanced in good faith money to the secretary of the defendant company on a certificate under the seal of the company certifying him and another person to be the owners of certain shares of the defendant company, and on an assignment of such shares, the certificate proved to be fraudulent and the director's names affixed thereto were forgeries, and the company refused to register the transfer. Kennedy, J., thought the case governed by *Shaw v. Port Philip Mining Co.* 13 Q.B.D. 103, and that the company were estopped from disputing the validity of the certificate, the Court of Appeal, however, came to the conclusion that there was no estoppel, because there was no holding out by the company of their secretary as having any right or authority to warrant the genuineness of the certificate; the articles of association expressly providing that such certificates must be signed by two directors. The Court of Appeal also held that the defendant company was not liable to the plaintiffs in damages for the fraud of their secretary. The plaintiffs were therefore practically without remedy.

PRACTICE — ATTACHMENT OF DEBTS — CHOSES IN ACTION — "DEBTS OWING OR ACCRUING"—13 ELIZ., C. 5 (R.S.O. C. 334, SS. 1-5) — PAYMENT BY GARNISHEE AFTER NOTICE OF ATTACHING ORDER—PAYMENT BY CHEQUE—DUTY TO STOP PAYMENT BY CHEQUE.

Edmunds v. Edmunds (1904) P. 362, although arising in a divorce case, is a decision on the practice of attachment of debts. A decree for alimony and costs was obtained by the plaintiff against the defendant. The defendant held, amongst other appointments, that of public vaccinator under the guardians of a certain parish, and also that of registrar of births and deaths. As public vaccinator the defendant was bound to keep a register of vaccinations, and the guardians agreed to pay him within a calendar month after the usual quarter days 1s. 6d. for each vaccination duly registered; and his right to pay depended on his punctual attendance for the purpose of vaccinating patients. His accounts

as registrar were required to be vouched by the superintendent registrar. On March 8, 1904, the defendant in consideration of an advance to carry on his business assigned to his father all his fees and salary as public vaccinator and registrar of births and deaths by way of mortgage. The father admitted that he took the assignment for the purpose of preventing his son's home being broken up by execution of the suit of the plaintiff. On the 24th March the first attaching order was issued, attaching all debts due and accruing due from the garnishees to the judgment debtor. At the date of this order the debtor had earned £38 18s. 6d. for vaccination fees and £7 8s. 1d. for registration of births, etc. On April 8th the garnishees gave a cheque to the debtor for £38 18s. 6d. which he indorsed to his father as assignee. And on April 22nd they gave him a cheque for £8 3s. 1d., which included the £7 8s. 1d. and a further sum of 15s. subsequently earned as registrar. This cheque was also indorsed by the debtor in favour of his father as assignee. On the application by the judgment creditor against the garnishees for an order to pay over they set up (1) that the fees in question were not attachable, as not being a present debt; and secondly, because they were in the nature of a salary not payable till pay-day comes, and there was nothing actually due at the time the attaching order was made; (2) that the claims had been assigned. Barnes, J., held that the fees in question constituted a debt accruing due, and as such were bound by the attaching order, and that the assignment was void under the Statute of 13 Elizabeth, c. 5 (R.S.O. c. 334, ss. 1-5); and that the judgment creditor was entitled to payment from the garnishees notwithstanding the payments made to the debtor.

SALE OF GOODS—CONDITIONS ATTACHED TO GOODS AS TO TERMS OF THE SALE THEREOF — NOTICE — RIGHT OF PURCHASER TO DISREGARD CONDITIONS.

McGruther v. Pitcher (1904) 2 Ch. 306, was a somewhat similar case to that of *Taddy v. Sterious* (1904) 1 Ch. 354 (noted ante p. 306), in which Farwell, J., came to a different conclusion. The goods in question were patent rubber revolving heel pads. The goods were manufactured and sold by the plaintiffs in boxes on the lid of which was a notice that they were sold to dealers subject to a condition that they should not be retailed for less than a certain specified sum. The defendant bought some of the goods and was orally informed of the condition, but had resold some of

them at less than the specified price. The plaintiff claimed an injunction, which Farwell, J., granted, limited to the duration of the patent under which the pads were manufactured. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.), however, considered the case was governed by *Taddy v. Sterious*, supra, which they held to have been well decided, and the decision of Farwell, J., was therefore reversed, holding that, even if the defendant bought the goods with notice of the condition it could not be enforced against him, there being no privity of contract between him and the plaintiffs, and it not being possible to make a condition of this kind even with the goods.

SEA SHORE—FORE-SHORE—PUBLIC RIGHT OF BATHING.

In *Brinckman v. Motley* (1904) 2 Ch. 313, the defendant, who was the headmaster of a public school, had taken the boys of the school down to the sea shore, where the plaintiffs had an exclusive right of fishing with stake nets, in order that the boys might bathe in the sea. The plaintiffs claimed an injunction, and the defendant set up that he and all His Majesty's subjects had a common law right to use the fore-shore of the sea for the purpose of bathing. Farwell, J., held that there was no such common law right, and the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) affirmed his decision, following *Blundell v. Caterall* 5 B. & Al. 268, 24 R. R. 353, the judgment of Holroyd, J., in which case is characterized, by Williams, L.J., as "one of the finest examples of the way in which the judgment of an English judge ought to be expressed and the reasons for it given." In that judgment it may be useful to note the learned judge pointed out, that the passage in Bracton in which such a right as the defendant claimed is asserted to exist, and which is based on Justinian Inst., lib. 2, tit. 1, ss. 2 and 4, has been held not to be the law of England.

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—PART PERFORMANCE—STATUTE OF FRAUDS—(R.S.O. c. 338, s. 5).

Dickenson v. Barrow (1904) 2 Ch. 339, was an action for the specific performance of an oral contract for the sale of lands. The contract was to sell the parcel of land in question on which the plaintiffs were to build a house for the defendant. The plaintiffs in pursuance of the alleged agreement built the house, and during the course of its erection the defendant and her husband from time to time visited it, and alterations were made by the plaintiffs at the defendant's request. Kekewich, J., held that these acts done

by the plaintiffs at the request of the defendant constituted a part performance of the contract and took the case out of the Statute. Our recollection of the earlier cases is that they very distinctly laid down that the acts of part performance, sufficient to take the case out of the Statute, must be plainly referable to the contract relied on, and we should venture to doubt whether the present decision would successfully stand the ordeal of an appeal, as it is somewhat difficult to see how the making alterations and improvements in a house in course of erection, at the suggestion of another person, is necessarily referable to a contract to sell the land to such other person.

WINDING UP—CREDITOR OUT OF JURISDICTION COMING IN TO PROVE CLAIM—SECURITY FOR COSTS.

In re Pretoria Petersburg Ry. Co. (1904) 2 Ch. 359, was a winding up proceeding in which a creditor, resident out of the jurisdiction, applied to the Court on originating summons for a declaration that he was entitled to prove a claim. The liquidators applied for an order that the creditor to give security for costs, which was refused by the registrar; but on appeal Buckley, J., held that the liquidators were entitled to the order.

SOLICITOR—COSTS—TAXATION—“THIRD PARTY INTERESTED CREDITOR IN ADMINISTRATION ACTION—SOLICITOR’S ACT, 1843 (6 & 7 VICT. c. 73) s. 39—(R.S.O. c. 174, s. 45).

In re Jones (1904) 2 Ch. 363, may be referred to as marking a difference between the English and Ontario Solicitor’s Act as regards the rights of third parties to tax a solicitor’s bills. Under Imperial Stat. 6 & 7 Vict. c. 73, s. 39, a person interested in an estate out of which costs are payable is entitled to have them taxed; and this case decides that a creditor who has obtained a judgment for the administration of an estate is a person so interested, and as such entitled to have a taxation of bills of costs which have been paid by the executor of the estate. The Ontario Act, R.S.O. c. 174, s. 45, on the other hand, is confined in terms to persons “liable to pay or who have paid any bill,” and under that Act a creditor upon estate out of which costs are payable is only entitled to have them moderated: see *Re Hague*, 12 P.R. 119.

ESTOPPEL—STATEMENT INDUCED BY SUPPRESSION OF MATERIAL FACT.

Porter v. Moore (1904) 2 Ch. 367, was an action brought by the mortgagees of a share in a trust fund against the trustees of the fund, claiming a declaration that the trustees held the mortgagor’s

share of the fund as trustees for the plaintiffs, and were estopped from alleging or setting up any prior encumbrance thereon. The ground of the alleged estoppel was the fact that the trustees had prior to the advance being made by the plaintiffs signed a memorandum to the effect that they had not received any notice of any prior claim. The trustee who first signed the memorandum did so at the request of the mortgagee's solicitor, who failed to inform him that the memorandum had been submitted to the trustees' solicitor and was then under consideration. The other trustee signed it, relying on the signature of his co-trustee, and also without being informed that it had been submitted to the trustees' solicitor. On the same day it was signed the solicitor of the trustees wrote to the mortgagee's solicitor informing that they never advised their clients to sign any such memorandum. As a matter of fact notice of a prior claim had been given and lost sight of. Under these circumstances Eady, J., came to the conclusion that the suppression of the information, that the propriety of giving the required memorandum was under the consideration of the trustees' solicitor, was so material that the trustees were not estopped by the memorandum signed under such circumstances from setting up the prior charge.

LEASE—ASSIGNMENT OF LEASE—COVENANT BY ASSIGNEE OF LEASE "TO PERFORM AND OBSERVE" COVEYANT OF LEASE—NEGATIVE COVENANT—RIGHT OF ASSIGNOR OF LEASE TO ENFORCE NEGATIVE COVENANTS IN THE LEASE AGAINST HIS ASSIGNEE—INJUNCTION.

In *Harris v. Boots* (1904) 2 Ch. 376, the plaintiffs were lessees of leasehold premises under a lease which contained a covenant by the lessees not to make alterations in the premises without the lessor's consent. The plaintiffs assigned the lease to the defendants, who covenanted with the plaintiffs "to perform and observe" the covenants of the lessee in the lease. After the assignment the defendants made certain structural alterations in the premises without the consent of the plaintiffs or of the lessor, and the present action was brought claiming a mandatory injunction to restore the premises to the condition they were in prior to such alterations. Warrington, J., who heard the action, held that the plaintiffs had no cause of action, and that the effect of defendant's covenant was merely to indemnify the plaintiffs against any damages arising from any breach of the covenants in the lease on the part of the lessees, but did not entitle the assignors of the

lease to sue for specific performance by the assignees of the negative covenants contained therein.

COMPANY—DEBENTURES—CONDITION THAT DEBENTURE IS TO BE PAID TO REGISTERED HOLDER—ASSIGNOR—ASSIGNEE—EQUITY AGAINST ASSIGNOR—TRUSTEE FOR CREDITORS.

In re Brown, Shepherd v. Brown (1904) 2 Ch. 448. The Court of Appeal affirmed the decision of Byrne, J. (1904) 1 Ch. 627 (noted ante p. 458), but it appearing by further evidence that the assignee for creditors was not the registered holder of the debentures, the allowance of the appeal was therefore without prejudice to his applying to the judge below to vary the certificate or enforce any equitable right he might have on that ground.

PUBLIC AUTHORITY—NOTICE OF ACTION—CLAIM UNDER CONTRACT—CONTRACT INCIDENT TO PUBLIC DUTY.

Sharpington v. Tulham Guardians (1904) 2 Ch. 449, was an action brought by a contractor against a municipal body to recover for loss and damage incurred in carrying out a contract for works required by the defendants for the purpose of carrying out their public duties. The amount stipulated for had been paid and the additional sum now claimed was for loss alleged to have been occasioned by negligence of and frequent change of plans by the defendants. The defendants set up the objection that they had received no notice of action, but Farwell, J., held that the plaintiff's claim being in respect of a private duty arising out of a contract and not for any negligence in performing a statutory or public duty the Public Authorities Protection Act (see R.S.O. c. 88, Con. Municipal Act, 3 Edw. VII. c. 19, s. 468) did not apply.

COMPANY — WINDING-UP — CONTRIBUTORY FORFEITED SHARES — RIGHT OF PRESENT HOLDER OF SHARES TO CREDIT FOR ALL PAYMENTS ON ACCOUNT.

In re Randt Gold Mining Co. (1904), 2 Ch. 468, adds a further point to our learning respecting shares in joint stock companies and seems to establish that while a share is to be regarded as a legal entity entitling the company after its issue to follow it through all its vicissitudes and to claim payment of the amount due in respect of it until it is paid in full, yet that the present holder of previously forfeited shares is entitled to credit for all sums paid in respect thereof. Therefore, where, as in this case, the articles provided for forfeiture of shares for non-payment of calls and also that notwithstanding the forfeiture the ex-shareholder shall continue liable to pay the amount of the calls, and under this provision

shares were forfeited and allotted to another person, Buckley, J., held that the latter was entitled on the winding-up of the company to be credited with all sums paid by the previous holder in respect of the shares either as shareholder or debtor in respect of his liability under the articles to pay calls notwithstanding the forfeiture of his shares.

**COMPANY—DEBENTURE—TRANSFER OF DEBENTURE TO COMPANY ISSUING SAME
—SUBSEQUENT TRANSFER BY COMPANY TO PURCHASER FOR VALUE.**

In re Routledge, Hummell v. Routledge (1904) 2 Ch. 474, also deals with an interesting point of company law. In this case a limited company issued £75,000 of debentures for £100 each, ranking *pari passu* as a first charge on the assets of the company. Some of these debentures were subsequently purchased by the company itself, to whom they were transferred in common form, and the company was thereupon registered as holders thereof. The company thereafter sold and transferred the debentures so purchased to various persons for value, to whom they were transferred in common form, and the transferees were thereupon registered as holders. On this state of facts Buckley, J., held that by the transfer of the debentures to the company they were extinguished, and the debt created thereby was absolutely gone and could not be revived by merely transferring the debentures to other persons, and that the transferees were not entitled to receive new debentures ranking *pari passu* with the £75,000 issue.

**REAL ESTATE—LIMITATION OF ESTATE—EQUITABLE ESTATE IN FEE—NO WORDS
OF INHERITANCE.**

In *Re Tringham, Tringham v. Greenhill* (1904) 2 Ch. 487, Joyce, J., was called on to construe a settlement whereby land was conveyed to trustees in trust for Mary Ann Tringham for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally as tenants in common, and in default of issue, then to such uses as Mary Ann Tringham should declare by her will. There were three children of the marriage, and the question was whether they took merely life estates, there being no words of inheritance, or whether they took the fee simple as tenants in common. Joyce, J., was of the opinion that it sufficiently appeared by the instrument that the intention of the settlor was to give the children absolute interests, and that notwithstanding the absence of any limitation to their "heirs" they were entitled to the fee : (see R.S.O. c. 119, s. 4 (3))

Correspondence.

ELECTION LAW—PARLIAMENTARY VACANCIES.

To the Editor of CANADA LAW JOURNAL.

SIR,—Some matters of interest as to Constitutional law have recently arisen in Ontario and seem worthy of discussion. Of the least of two evils by which he is just now confronted the Premier of Ontario would probably find it wiser to choose dissolution. Reconstruction, with the attendant feature of clearing off the by-elections, has difficulties peculiar to itself. It is said that portfolios are to be offered to the Speaker and the member for Brockville, if not to the representative for North Grey as well. But is it competent for any of these gentlemen to resign or otherwise bring about the vacation of their seats and come before their old constituencies for re-election?

Section 16 of c. 12, R.S.O. 1897, which treats of the case of a member accepting office, has the following provision:—"If any member of the Legislative Assembly becomes a member of the Executive Council . . . his election shall thereby become void, and his seat shall be vacated, and a writ shall, in the manner provided by sections 36 and 37, issue for a new election as if he were naturally dead; but he may be elected if he is not declared ineligible under the Act." Referring to sections 36 and 37, which are therein spoken of as those proper to be invoked, they seem to comprehend a vacancy arising during a session of the assembly, or a notification of which, at all events, must await its inauguration. This view was deliberately set up by the Attorney-General in the North Renfrew instance to break the force of the Opposition's protest against the long delay in bringing on the election there. He repudiated on the strength of these enactments the charge of default occurring at any stage earlier than the meeting of the House.

Section 36 reads: "If a vacancy happens in the Legislative Assembly by the death of a member, or his accepting any office, commission or employment" [does "office" here mean membership in the Cabinet], "the Speaker, on being informed of the vacancy by a member of the said assembly in his place, or by

notice in writing under the hands and seals of two members of the said assembly, shall forthwith address his warrant to the Clerk of the Crown in Chancery for the issue of a new writ for the election of a member to fill the vacancy, and a new writ shall issue according." Section 37 reads: "If when a vacancy happens, or at any time thereafter, before the Speaker's warrant for a new writ has issued, there is no Speaker of the said assembly, or the Speaker is absent from the Province, or if the member whose seat is vacated is himself the Speaker, then two members," etc. [direction to the same effect as in s. 36].

The first appears to deal with a vacancy created by the action of an ordinary member, the last of the Speaker himself. Removing both from consideration as being inapplicable, one has to fall back on either section 34 or 35 for the *modus operandi* where a session is not in progress.

Section 34 enacts that "a member may address and cause to be delivered to the Speaker a declaration of his intention to resign his seat, made in writing under his hand and seal before two witnesses, which declaration may be made and delivered either during a session of the Legislature or in the interval between two sessions; and the Speaker shall, upon receiving such declaration, forthwith address his warrant under his hand and seal for the issue of a writ for the election of a new member in the place of the member so resigning."

To say nothing of the circumstance that none of the expected vacancies would involve resignation, does the section contemplate the case of a member resigning with the purpose of appealing anew to his constituency? Does it not refer to distinct personalities when providing that a new member should be chosen in the place of the member resigning? In putting such interpretation on the Act the writer is aware that it would deprive a member of the privilege he is deemed to possess of seeking approval of his course in Parliament at any time. The obdurate clause nevertheless seems to stand in the way.

As to the Speaker, section 35, making provision for his forwarding his declaration to two members of the Legislature, speaks of "the issue of a new writ for the election of a member (whether ordinary or not) in the place of a member so notifying his intention to resign." The changed position of the adjective might be

held to weaken slightly the force of the argument, though it would seem to the writer to leave the point unaffected. It did not suffer transposition, for the original Act, 32 Vict. c. 4, has the same phraseology.

The strongest reasoning that can be employed for the maintenance of the position that a private member who meditates accepting office would have to present himself before a different electorate is obtained, however, from the language of section 28, appointing the course to be followed when a member is declared to have forfeited his seat after the trial of an election petition. These are its terms: "Forthwith after the receipt by the Speaker of a certificate of the judges determining an election petition, and certifying that the election was void, the Speaker shall address his warrant under his hand and seal to the Clerk of the Crown in Chancery for the issue of a new writ for the election of a member for the constituency the election for which has been certified to be void." Has no importance to be attached to the omission of the words "in the place of the member," etc.? Besides, the election for the constituency and not of the member is that which becomes avoided.

J. B. MACKENZIE.

Nov. 15th, 1904.

A CHANCE FOR EVERYBODY.—The Korean penal code lays down explicit directions as to the punishments to fit all the various crimes which the compilers could call to mind, and then, lest any guilty man escape, rounds out the matter in section 672 with a kind of residuary clause to the effect that "any one who has done anything he should not have done shall get forty lashes." This calls to mind Hamlet's remark: "Use every man after his desert and who should 'scape whipping?" Episcopalians who brazenly boast every Sunday that they "have done those things they ought not to have done" would better keep away from Korea.

TO HORSE FOR LIFE, REMAINDER TO MOTHER.—In a will recently probated in New York City the testator bequeathed the sum of \$600 in trust to his executor to be used for the care and support of his horse Trilby. In the event of the prior death of Trilby the unexpended balance goes to the testator's mother.

 REPORTS AND NOTES OF CASES.

Province of Ontario.

 COURT OF APPEAL.

Full Court.] FENSOM v. C. P. R. Co. [Nov. 14.
Railways—Accident—Cattle running at large—Crown lands—Powers of municipalities—Railway Act.

Judgment of the Divisional Court herein, ante p. 160, 7 O. L. R. 254, confirmed.

Hellmuth, K.C., for appellants. *Clary*, for respondent.

Full Court.] MARKLE v. DONALDSON. [Nov. 14.
Master and servant—Negligence—Injury to servant—Workmen's Compensation Act—Defect in works, etc.—Person intrusted—Fellow servant.

Judgment of Divisional Court herein, ante p. 350, 7 O. L. R. 376, confirmed.

Lynch-Staunton, K.C., for appellant. *Riddell*, K.C., for respondents.

Court of Appeal.] McFADDEN v. BRANDON. [Nov. 14.
Limitation of actions—Mortgage—Interest—Default.

Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come and a right of action therefor then arises and the Statute of Limitations then begins to run. Judgment of STREET, J., 6 O. L. R. 247, affirmed.

Judd, for appellant. *Purdom*, K.C., for respondent.

Full Court.] OSTERHOUT v. OSTERHOUT. [Nov. 14.
Will—Construction—Bequest of personalty—"Reversion"—Gift over—Life interest—Absolute interest.

The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . and one-half of all other my real and personal estates whatsoever and wheresoever with reversion to my brother on the decease of my father;" and gave devised and bequeathed to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank.

Held, confirming the decision of the court, ante p. 351, 7 O.L.R., 402, that the father was entitled only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

Middleton and Widdifield, for appellant. *George Kerr*, and *J. Montgomery*, for respondent.

Court of Appeal.]

[Nov. 14.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL
ONTARIO R.W.Co.

Interest—Arrears—Bond—Mortgage—Foreclosure—Railway—Limitation of action.

Bonds under seal issued by a railway company contained a covenant to pay half yearly instalments of interest evidenced by attached coupons, and payment of principal and interest was secured by a mortgage of the undertaking which also contained a covenant to pay:—

Held, in foreclosure proceedings upon this mortgage that the interest being a specialty debt and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons whether attached to the bonds or detached therefrom were entitled to rank for all instalments which had fallen due within twenty years, and not merely those which had fallen due within six years. Judgment of *Boyd, C.*, 6 O.L.R. 534, affirmed.

Held, also, that even if the case were dealt with upon the footing of the mortgage being one of realty only there was the right to rank for there were no subsequent encumbrancers and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question.

T. P. Galt, for appellants. *Aylesworth, K.C.*, and *J. H. Moss*, for respondents.

HIGH COURT OF JUSTICE.

Idington, J.]

TABB v. GRAND TRUNK R.W. Co.

[August 18.

Execution—Stay—Judgment affirmed by Court of Appeal—Proposed appeal to the Supreme Court of Canada—Necessity for leave—Powers of Master in Chambers and Judge of High Court—Grounds for exercise.

After a verdict and judgment for plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of defendants, made an order staying proceedings until such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed.

Held, that the Master had no jurisdiction to make such an order—Rule 42, clause 17 (d).

If a Judge of the High Court in Chambers has the power to make such an order (and, *semble*, he has) this was not a proper case for the exercise of it. The judgment being for only \$400 damages and costs there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference.

Quare, whether the stay of execution in such a case rests with the High Court or Court of Appeal.

Slaght, for plaintiff. *H. E. Rose*, for defendants.

Meredith, C.J., Idington, J., Magee, J.] [Sept. 19.

LAWS v. TORONTO GENERAL TRUSTS CORPORATION.

Mortgage—Account—Payments by mortgagees—Release of claim—Improvements—Solicitor—Negotiation of sale—Commission.

Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim.

Held, 1. Upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.

2. They were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor.

Du Vernet, for plaintiffs. *Shepley*, K.C., for defendants.

Cartwright, Master.] CANTIN v. NEWS PUBLISHING CO. [Sept. 19.

Discovery—Examination of former officer or servant.

There is no power now under Con. Rule 439 (a), as substituted by Con. Rule 1250 for Con. Rule 439 (1), to make an order for the examination of a former officer or servant of a corporation for discovery.

W. N. Ferguson, for the motion. *Thos. Reid*, contra.

Magee, J.] [Sept. 20.

RE ESTATES LIMITED AND THE WINDING-UP ACT.

Winding up proceedings—Two petitions—Conduct of proceedings given to second petitioner.

When there were two petitioners for a winding-up order against the one company, although orders were made under both petitions, the conduct of the proceedings was given to the later petitioner, a creditor for

money paid, in preference to the earlier one who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution of the winding-up as the other.

S. B. Woods, for M. M. Anderson. *C. Elliott*, for A. McMillan. *S. King*, for the company.

Master in Chambers.] *MOFFAT v. LEONARD.* [Sept. 21.

Discovery—Examination of person for whose benefit action defended.

Rule 440 providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended.

Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before and after it was brought:—

Held, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants.

Kilmer, for plaintiff. *C. A. Moss*, for defendants.

Meredith, J.] *IN RE WEST ALGOMA VOTERS' LISTS.* [Oct. 4.

Parliament—Preparation of voters' lists—Dominion Franchise Act, 1898, s. 9—Appointment of persons to prepare lists—Order in Council—Prohibition—Powers of High Court.

The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists.

Re North Perth, Hesson v. Lloyd, 21 O.R. 538, distinguished.

The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. On the facts of this case, it was within the power of the Governor-General in Council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal court constituted by the section. Their officers are to follow, as far as possible, the

provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists.

If the order in Council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect. If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the court upon an application for prohibition.

St. John, for applicant. *W. Barwick*, K.C., for the Minister of Justice for Canada. *J. H. Moss*, for the Secretary of State for Canada. *A. Mills*, for respondent.

MacMahon, J.]

[Oct. 26.

IN RE THE CANADA WOOLLEN MILLS, LIMITED.

Winding-up—Purchase by inspector—Fiduciary capacity—Liquidator—Referee—Sale—Jurisdiction—R.S.C. c. 29, ss. 31, 33.

An inspector appointed in a liquidation under the Winding-up Act, R.S.C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered.

It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator.

W. H. Blake, K.C., for W. T. Benson & Co. *Hellmuth*, K.C., for W. D. Long. *G. H. D. Lee*, for certain creditors. *R. Cassels*, for liquidator.

Province of New Brunswick.

COUNTY COURT.

Carleton, Co. J.]

[July 26.

IN RE LICENSES GRANTED TO R. B. SIROIS AND OTHERS.

Liquor Licenses—Number regulated by population as found by census returns as to wards—No such information given in census.

This was an application under s. 31 of the Liquor License Act, 1896, to set aside all the licenses (three retail and two wholesale), granted by the commissioners of licenses for the town of Grand Falls, to sell intoxicating liquor within the said town for the year 1904-5.

The only question of law that arose was as to whether the number of licenses granted was in excess of the number authorized by the statute.

Sec. 19 of the act (amended 60 Vict., c. 6, s. 6, sub-s. 1), provides for the number of licenses which may be granted in each municipality in proportion to the number of inhabitants. Grand Falls has three wards, known as wards 1, 2 and 3. All the retail licenses were granted for premises situate within the limits of ward 2. For the regulation of licenses, as per number of inhabitants, under the section above quoted, the statute

gives the following directions: "The number of population which is to determine the number of licenses at any time under this act shall be according to the then last preceding census taken under the authority of the Dominion of Canada.

CARLETON, CO. J. : The last census returns of the Dominion do not give the population of Grand Falls or of any of the cities or towns of New Brunswick, except the city of St. John, by wards, and we are faced with the difficulty of being called upon to decide this question without the means, and the only means by which the law contemplates that it shall be decided. The census returns of Grand Falls are given in bulk, and there is no legal means by which we can determine how many or how few of the population are to be assigned to the respective wards. I am absolutely without knowledge, personal and otherwise, to assist me in saying how many persons live in ward 2. The whole town, for ought I know, may reside within the boundary lines of this ward. In a word we are led to the absurdity of having to ascertain the population of a ward by a given means which means does not exist. The presumption of law is that the commissioners acted legally and within the scope of their authority and the onus of showing the contrary is on the applicants. This they have failed to do, because they could not do it for want of a proper census. Either the commissioners have no power to grant any licenses or they have power to grant them without limitation as to number—and this applies to every city, except St. John, and every incorporated town in the province where the Liquor License Act is in force and operation. To decide either way would be to defeat the objects of the act; and to decide that the commissioners have no power to issue any license would work a great injustice to the present licensees at Grand Falls, imposing upon them personal disabilities as to future licenses together with destruction of business and probable loss of the license fees they have in good faith paid. I am therefore of the opinion that the matter is one for the attention of the legislature and not for the courts.

Application dismissed without costs.

Gallagher, for applicants. Carvell, contra.

Province of Manitoba.

KING'S BENCH.

Full Court.]

MAKARSKY v. C. P. R. Co.

[July 12.

Workmen's compensation for Injuries Act—Lord Campbell's Act—Claim of father for damages for death of boy by accident resulting from negligence—Who may sue—Loss of future pecuniary benefit from the life—Pleading—King's Bench Act, rules 306, 453—Demurrer.

The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of defendants, upon one of whose freight trains he was working as a brakeman at the

time of the accident which resulted in his death. The alleged negligence consisted of the absence of air brakes and bell signal cord from the equipment of the train. The statement of claim was demurred to on various grounds.

Held, 1. No person can sue under the Workmen's Compensation for Injuries Act, R. S. M. 1902, c. 178, for damages for the death of a deceased relative, who could not sue under c. 31, R. S. M. 1902, which takes the place of Lord Campbell's Act, and the statement of claim must show, either that the plaintiff is the executor or the administrator of the deceased, or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it was not sufficient for plaintiff to state simply that he was the father and sole heir at law of the deceased. *Lampman v. Gainsborough*, 17 O. R. 191, and *Mummery et ux. v. G. T. R.* 1 O. L. R. 622, followed.

2. It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased: *Davidson v. Stuart*, 14 M. R. 74. *Chapman v. Rothwell*, 27 L. J. N. S. Q. B. 315, not followed. When the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under rule 306 of the King's Bench Act, R. S. M. 1902, c. 40, should be set out in the statement of claim.

3. Under the circumstances appearing in this case it was not necessary that the action should be shewn to be brought for the benefit of all persons entitled to claim damages.

4. Although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cord and air brakes, it is still a question of evidence whether the absence of those appliances on freight trains is negligence for the purposes of such an action, that is whether they may be reasonably required or could be reasonably furnished for the protection of the train hands, and the statement of claim was not demurrable because it relied on that absence as constituting negligence.

5. The statement of claim should allege that the defendants were aware of the defects relied on as constituting negligence or should have known of them: *Griffiths v. London and St. Katharines Dock Co.*, 12 Q. B. D. 493, 13 Q. B. D. 259. *PERDUE, J.*, dissented from the decision on this point.

6. It is not necessary to allege that the deceased was ignorant of the existence of the alleged defects. Though such an allegation was held necessary in the *Griffiths* case, that case has been reversed on this point in the subsequent cases of *Smith v. Baker* (1899) 2 Q. B. 338, and *Williams v. Birmingham* (1899) 2 Q. B. 338. Mere knowledge on the workman's part is not in itself a bar to the action. It would have to

appear not only that he knew of the special danger, but that he took upon himself and agreed to assume the risk of injury resulting therefrom.

7. The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative, and the omission to give the name and description of the person in defendant's service by whose negligence the accident occurred is a matter to be dealt with by an application for particulars and not by demurrer.

8. The refusal or neglect of defendants to provide medical or surgical attendance for the injured employee gives no cause of action: *Wennall v. Adney*, 3 B. & P. 247. Therefore the allegations in the statement of claim that the deceased came to his death as a result of injuries received and of the alleged neglect to provide medical or surgical care are demurrable. They make it appear that the injuries were not by themselves the cause of the death, but there is no right of action unless death resulted from the injuries alone. See s. 2 of c. 31, R. S. M. 1902.

9. Plaintiff in such an action has no right to claim for funeral expenses of the deceased.

10. That the time allowed by the statute for the commencement of the action had expired when the demurrer was argued was no objection to the allowance of amendments to the statement of claim, which did not seek to introduce any new or different causes of action. *Weldon v. Neal*, 19 Q. B. D. 394, distinguished.

11. Under rule 453 of the King's Bench Act it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers under rule 326 to strike them out is the proper remedy.

Demurrer allowed with leave to the plaintiff to amend as he may be advised, but not to set up any claim for compensation on behalf of any other person, and on condition that he strike out the allegation that he is the heir-at-law of the deceased and the claim for funeral expenses and the allegation of neglect and refusal to provide medical and surgical attendance. Costs to be in the cause to defendants in any event.

Potts and Hartley, for plaintiff. *Aikins*, K.C., for defendants.

Perdue, J.]

GARDINER v. BICKLEY.

[Oct. 24.

Demurrer—Argument of, before trial—King's Bench Act, Rule 453.

This action was founded upon an agreement under which the defendants were to transfer to the plaintiff certain shares in companies and other property in consideration of which the plaintiff agreed to make certain payments in money, deliver certain stock and transfer to the defendants certain lands. The plaintiff alleged that he had conveyed the land, but

charged that he had been induced to enter into the agreement by the misrepresentations of the defendants, and that the shares transferred to him were of no value. He claimed \$210,000 damages, and also a lien on the land transferred for \$150,000. In the statement of defence a question of law was raised as to the plaintiff's right to a lien on the land as claimed. Defendants moved, under Rule 453 of the King's Bench Act, R.S.M. 1902, c. 40, for an order to have the demurrer disposed of or argument before the trial of the case.

Held, that such an order should only be made when the points of law involved are such as affect the whole case, and the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining: *Makarsky v. C.P.R.*, in this Court, not yet reported; *London, Chatham & Dover Ry. v. South Eastern Ry.*, 53 L.T. 109; *Parr v. London Assurance Co.*, 8 T.L.R. 88; *Scott v. Mercantile Accident Ins. Co.*, ib. 431.

If the question of the plaintiff's right to a lien in this case were argued and decided the main issues raised in the action would still remain undisposed of. Under the rule the question is largely one of convenience, and it would likely prove very inconvenient for the Court to hear and determine piecemeal the various matters involved in a suit so complicated.

Motion refused. Costs to be in the cause to the plaintiff.

Hudson, for plaintiffs. *Minty*, for defendants.

Dubuc, C.J.]

MAHER v. PENKALSKI.

[Oct. 24.

Sale of land—Statute of Frauds—Name of purchaser not stated in memorandum—Specific performance.

Action for specific performance of the following agreement :

"\$25.00

Winnipeg, 2nd March, 1904.

Received from Baker & Richardson, the sum of twenty-five dollars deposit on the purchase of lots, 38 and 39 Price \$3,800, payable \$1,700 cash (less deposit of \$25.00) the balance upon second mortgage for \$2,100, payable in monthly payments of \$100.00 each, with interest of 6% per annum. Taxes and insurance to be adjusted.

"Oscar M. White,

Agent for the owner, Basil Penthalski."

Held, 1. Although Baker & Richardson were the agents of the purchaser, the agreement did not comply with the Statute of Frauds, as it did not contain the name of the purchaser or any statement as to the person to whom the property was to be sold: *Potter v. Duffield*, L. R. 18 Eq. 4; *White v. Tomalin*, 19 O. R. 513, and *Williams v. Jordan*, 6 Ch. D. 517 followed.

2. In any event the plaintiff had been guilty of such laches, bad faith and default in payment as to disentitle himself to the exercise of the judicial dissention to grant specific performance of the agreement.

Baker, for plaintiff. *Mathers*, for defendant.

Province of British Columbia

SUPREME COURT.

Full Court.]

BAILEY v. CATES.

[April 26.

Shipping—Vessel moored to another—Negligence—Extraordinary storm—Act of God.

Appeal to the Full Court from judgment of IRVING, J., in favour of the plaintiff.

While plaintiff's tugboat the "Vigilant" was tied to a wharf in Vancouver Harbour, defendant brought his tugboat the "Lois" alongside and tied her to the "Vigilant." The next night (Christmas) a violent storm arose—a storm of which there were no indications, and which was the severest ever experienced in the harbour—and the "Lois," whose crew were absent, bumped against the "Vigilant" and damaged her.

Held, in an action for damages for negligence, reversing IRVING, J., that it had not been shewn that the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God.

W. J. Bowser, K.C., for appellant. *A. D. Taylor*, for respondent.

Martin, J.]

McHUGH v. DOOLEY.

[July 24.

Will—Testamentary capacity—Undue influence—Delusions—Certificate of Physician—Evidence—Costs.

Action to admit to probate in solemn form a will and codicil.

Held 1 The best evidence of testamentary capacity is that which arises from rational acts, and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected.

2 Where one who benefits by a will procures it to be prepared without the intervention of any worthy witness or anyone capable of giving independent evidence as to the testator's intentions and instructions, it will be regarded with suspicion and its invalidity presumed, and the onus is on the party propounding it to clearly establish it.

3 Where a physician improperly gives a certificate as to testamentary incapacity of his patient it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto.

Held, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused.

In the unusual circumstances the Court made no order as to costs.

A. P. Luxton and *R. H. Pooley*, for plaintiff. *A. E. McPhillips*, K.C., and *G. H. Barnard*, for defendant.

Full Court.] LARSEN *v.* CORYELL. [Nov. 11.
Small Debts Court—Appeal from—Finality of—R.S.B.C. 1897, c. 55, s. 29;
B. C. Stat. 1899, c. 19, s. 2, and County Courts Act, ss. 164, 167.

Appeal to the Full Court from a judgment in the County Court on an appeal from the Small Debts Court.

Held, that the appeal, given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final.

Clement, for appellant. *Kappele*, for respondent.

Courts and Practice.

CHANGES AT OSGOOD HALL, TORONTO.

Mr. Holmested, K.C., who has held the office of Accountant of the Supreme Court of Judicature for Ontario ever since the establishment of the office in 1881, has recently resigned that office, and on the 10th November last Mr. Benjamin W. Murray, was appointed in his stead, Mr. Lawrence Boyd, Chief Clerk, taking Mr. Murray's place, with the title of Assistant Accountant; Mr. Holmested suffering no loss of income by this arrangement. For nine years prior to Mr. Holmested's appointment as Accountant he had countersigned all cheques issued from the office of the Accountant of the Court of Chancery, which office was merged in that of the Accountant of the Supreme Court of Judicature, on the passing the Judicature Act in 1881, so that for a period of 32 years he has been concerned in the superintendence of payments out of court, which in the aggregate have amounted to about \$43,000,000.

The increase in business during the past 23 years has been phenomenal. The amounts paid out during the years 1878-1896 fluctuated from a little over \$1,000,000, to \$4,000,000 in 1891, the high water mark. Prior to 1896 suits for the administration of deceased person's estates were common and large amounts found their way into court in such suits. In 1896 the Devolution of Estates Act was passed and one of the first results was that the payments out dropped to \$875,461, the lowest figure in 20 years. Since then, though administration suits are now rarely brought, the payments out have from various causes increased. In 1899 they reached nearly \$2,000,000, but in 1903 dropped to about \$1,200,000. The amount now in court is in the neighborhood of \$3,000,000, so that it is easily seen what large interests are involved.

Mr. Murray, the new Accountant, has been in the office almost from the time when it merged from its infancy; and though not in office when the breastcoat pocket of the late Mr. Grant was the receptacle of the accounts of the Court of Chancery, he entered the service soon after that embryo condition had passed away, and has given faithful service to the public. More than fifty bulky ledgers now barely suffice to contain the accounts.

Mr. Lee, the efficient Clerk of the Weekly Court, has, we are glad to see, been promoted to the position of a Junior Registrar. He will continue to discharge the duties of Clerk of the Weekly Court, and will in addition perform some of the duties formerly discharged by Mr. Holmested.

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